Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In the

Supreme Court of the United States

JOHN F. HINCK and PAMELA F. HINCK,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON A PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Before 1996, the circuits held that district courts and the Court of Federal Claims had 28 U.S.C. §§1346(a)(1) and 1491(a)(1) refund jurisdiction over claims to abate interest under 26 U.S.C. §6404(e)(1), but were barred from exercising that jurisdiction because abatement was discretionary and there was no articulated standard for reviewing denials of those requests. The Tax Court held it had no prepayment jurisdiction over §6404(e)(1) at all and followed the circuit courts' discretionary analysis in the exceptional cases where it had overpayment jurisdiction.

In 1996, Congress amended §6404, giving the Tax Court prepayment jurisdiction to review IRS denials of some taxpayer §6404(e)(1) abatement requests using an abuse of discretion standard.

The IRS now asserts the Tax Court has exclusive jurisdiction over both §6404(e)(1) prepayment and refund cases. In *Beall v. U.S.*, 336 F.3d 419 (5th Cir. 2003), the Fifth Circuit held that the 1996 amendments resolved the lack of a justiciable standard issue that precluded exercise of district court refund jurisdiction and resulted in exclusive but limited Tax Court prepayment jurisdiction and limited concurrent refund jurisdiction. The Federal Circuit acknowledged it created a conflict with the Fifth Circuit. The Federal Circuit's exclusivity holding precludes any judicial review of many claims.

The question presented here is:

> Did the grant of selective, limited jurisdiction in the 1996 amendments give the Tax Court exclusive jurisdiction over all §6404(e)(1) claims, deny all relief for many taxpayers, and repeal by implication the existing 28 U.S.C. §§1346(a)(1) and 1491(a)(1) refund jurisdiction of the district courts and the Court of Federal Claims?

PARTIES TO THE PROCEEDINGS BELOW

The following are parties to the proceeding in the matter before the Court of Appeals for the Federal Circuit:

John F. Hinck

Pamela F. Hinck

The United States of America.

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OPINIONS BELOW

The opinion below of the United States Court of Appeals for the Federal Circuit is reported at *Hinck v. U.S.* , 446 F.3d 1307 (Fed. Cir. 2006). App. 1.[1] The conflicting opinion of the United States Court of Appeals for the Fifth Circuit is reported at *Beall v. U.S.* , 336 F.3d 419 (5 th Cir. 2003). App. 18.

JURISDICTION

The judgment of the Federal Circuit was filed on May 4, 2006. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The relevant portions of the following statutes, regulations, and legislative history at issue are reprinted in the appendix to this petition due to their length:

1. 26 U.S.C. §6404(e)(1),[2] App. 42.

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[1] References to "App. x" are to page "x" of the attached Appendix.

[2] As originally enacted by the Tax Reform Act of 1986, § 1563, Pub.L. No. 99-514, 100 Stat.2085, 2762. Congress amended §6404(e)(1) in 1996 with the Taxpayer Bill of Rights II, which is also known as "TBOR2." P.L. 104-168, § 301(a), 110 Stat. 1452 (1996). App. 62. The amendments made two changes to §6404(e)(1): the word "unreasonable" was added before "error or delay," and the words "ministerial act" were changed to "ministerial or managerial act." Those changes were effective for tax years beginning after July 30, 1996, and do not apply to this case, which concerns tax year 1986. The pre-1996 version of §6404(e)(1) is reproduced in the Appendix.

2. 26 U.S.C. §6404(h),[3] App. 42.
3. 26 U.S.C. §7422(a), App. 48.
4. 26 U.S.C. §7430(c)(4)(A)(ii), App. 49.
5. 26 U.S.C. §7442, App. 50.
6. 28 U.S.C. §1346(a)(1), App. 51.
7. 28 U.S.C. §1491(a)(1), App. 52.
8. 28 U.S.C. §2412(d)(1)(B), App. 54.
9. 28 U.S.C. §2412(d)(2)(B), App. 54.

STATEMENT OF THE CASE

1. Statement of Related Cases

This case and *Beall* arose from disputes over the tax treatment of 43 related limited partnerships that shared a common general partner, AMCOR, a California corporation, and are collectively referred to by the IRS and in this litigation as the "AMCOR partnerships." John Hinck invested as a limited partner in Agri-Cal Venture Associates.[4] Raymond Beall was a limited partner in Ag-Venture Associates and Oasis Date Associates.[5]

These two cases represent a group of almost two

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[3] In the 1996 amendments, §6404(h) was initially designated §6404(g). It was redesignated as §6404(i) by the IRS Restructuring and Reform Act of 1998, Pub L. No. 105-206, and then redesignated as §6404(h) in 2002 by P.L. 107-134, § 112(d)(1). This amendment applies to requests for abatement submitted after July 30, 1996, regardless of the tax year, and thus applies to the Hincks' claim.

[4] Though not at issue, via ACVA he was also an indirect partner in Rancho California Partners II. Pamela F. Hinck is involved here only because the Hincks filed a joint 1986 return.

[5] *Hinck v. U.S.*, 64 Fed.Cl. 71, 72 (2005); *Beall v. U.S.*, 335 F.Supp.2d 743, 745 (E.D. Tex. 2004); see also *Beall v. U.S.*, 170 F.Supp.2d 709 (E.D. Tex. 2001).

hundred cases pending primarily in, and split roughly equally between, the various district courts of the Fifth Circuit and the Court of Federal Claims. Counsel for the Hincks also represents the Bealls and the partners in those two hundred or so other currently pending cases. Counsel represents over one hundred other AMCOR partners who filed §6404(e)(1) refund claims but have not yet filed suit. Those actions will be filed as they become ripe.[6]

The §6404(e)(1)[7] refund claims in these cases all arose out of identical facts regarding ministerial errors or delays in the consolidated IRS examination of the partnerships. All of the claims assert the same legal grounds for relief and rely on the same authorities.

Almost all of these cases also involve claims for refund of tax, interest, and penalty interest on other grounds not at issue here. All of those other cases are stayed pending the outcome of *Beall*, *Hinck*, and other cases that are representative of the other grounds for refund. The Fifth Circuit has addressed some of those other grounds in a consolidated appeal from two district court cases at *Weiner v. U.S.*, 389 F.3d 152 (2004).[8] Relying on *Beall*, in *Weiner* the Fifth Circuit held that the district court had jurisdiction over those partners' §6404(e)(1) claims and remanded

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6 Counsel lacks specific knowledge, but there may be AMCOR related §6404(e)(1) refund cases currently pending or waiting to be filed other than those represented by the undersigned counsel.

7 Unless otherwise indicated all references to section, §, and the Code are to the Internal Revenue Code at 26 U.S.C. References to §1346(a)(1) and §1491(a)(1) are to 28 U.S.C.

8 The Fifth Circuit vacated and remanded the dismissal for lack of jurisdiction over plaintiffs' §6404(e)(1) claims at *Weiner v. U.S.*, 213 F.Supp.2d 728 (S.D.Tex., 2002); *Kraemer v. U.S.* , 2002 Wl 575791 (S.D.Tex., 2002) (unpublished).

Weiner's claims for consideration on the merits.

Morris Weiner and John Hinck were both limited partners in Agri-Cal Venture Associates. In the Fifth Circuit Morris Weiner has the right to a determination on the merits of his claim for refund in federal district court. The Federal Circuit denies that same right to John Hinck in the Court of Federal Claims.

2. Summary of the Proceedings

The IRS examined the AMCOR partnership returns and ultimately assessed related tax and interest against the individual partners, including Weiner, the Bealls, and the Hincks.

All three paid their assessments and filed identical claims for refund under §6404(e)(1), which the IRS denied. App. 4, 19.

Beall filed suit in the Federal District Court for the Eastern District of Texas, App. 19, and Weiner filed in the Southern District of Texas. *Beall* was the lead case on the §6404 issue and *Weiner* on the other issues. The Hincks later filed suit to recover on their claims in the Court of Federal Claims. App. 4.

In both *Beall* and *Hinck*, the government filed Rule 12(b)(1) motions to dismiss for lack of subject matter jurisdiction, App. 4, 19, asserting that §6404(e)(1) claims are still not justiciable and the federal district courts and the Court of Federal Claims lack jurisdiction to consider those claims because TBOR2 granted the Tax Court exclusive jurisdiction over §6404(e)(1). App. 5, 19.

The Bealls and the Hincks responded that a prior line of authority unanimously held the district courts and the Court of Federal Claims had refund jurisdiction over §6404(e)(1) claims under §§1346(1)(1) and 1491(a)(1), but were barred from exercising that jurisdiction because (i) the

IRS had total discretion over §6404(e) abatements, and (ii) the claims were not justiciable because of a perceived lack of a standard for reviewing the IRS's decision to grant or deny the abatement.[9] Over time, the analysis behind the original refusal to exercise jurisdiction became blurred and courts relying on those cases came to incorrectly refer to their "lack of jurisdiction" over §6404(e)(1) interest abatement claims.[10]

The Bealls and the Hincks both asserted that by giving the Tax Court jurisdiction and setting abuse of discretion as the standard of review, the 1996 amendments clarified that the IRS does not have total discretion over §6404(e)(1) abatement claims and they are justiciable. Consequently, the district courts and Court of Federal Claims should no longer have been precluded from exercising jurisdiction over §6404(e)(1) refund claims. Both the Hincks and Bealls asserted that nothing in the amendments or legislative history indicated Congress intended to limit or repeal that §§1346(a)(1) and 1491(a)(1) jurisdiction and vest the Tax Court with "exclusive" jurisdiction over §6404(e)(1) claims.

On June 27, 2003, the Fifth Circuit issued its opinion in *Beall*, addressing the same substantive legal and factual arguments raised below in *Hinck*. App. 18-38. The Fifth Circuit exhaustively analyzed §1346(a)(1) and §7422(a)*vis a vis* §6404(e)(1), App. 20-26, found that claims for refund

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9 *E.g., Selman v. U.S.*, 941 F.2d 1060, 1062 (10th Cir. 1991); and *Horton Homes, Inc. v. U.S.*, 936 F.2d 548, 550 (11th Cir. 1991). Judge Allegra issued the Court of Federal Claims decision in this case and was one of the government's appellate attorneys of record in *Horton Homes*. That opinion references an unpublished Federal Circuit opinion that likewise held the Court of Federal Claims had §1346(a)(1) jurisdiction over §6404(e)(1) claims. *Kapp v. U.S.*, 989 F.2d 1202 (Table), 1993 WL 26728 (Fed.Cir. 1993). Judge Lourie authored both *Hinck* and *Kapp*.

10 *Argabright v. U.S.*, 35 F.3d 472, 475 (9th Cir. 1994)

under §6404(e)(1) fit squarely within §1346(a)(1)and §7422(a), App. 26, and held the issues precluding the exercise of jurisdiction had been addressed by the 1996 amendments. App. 30. The Fifth Circuit was not persuaded that the grant of jurisdiction to the Tax Court automatically and silently repealed or limited §1346(a)(1) jurisdiction over §6404(e)(1) claims for refund. App. 35-36.

The Fifth Circuit was persuaded that §6404(h) was added due to the limited nature of the Tax Court's jurisdiction, which is required to be set out in the Tax Code, and nothing more should be read into the grant because nothing in the statute or legislative history indicated Congress meant for the grant to be exclusive. App. 36-37.

In 2006, the Federal Circuit held in *Hinck* that the grant of jurisdiction to the Tax Court was exclusive and, consequently, the Court of Federal Claims did not have jurisdiction over §6404(e)(1) claims. App. 11-12. The Federal Circuit based its decision only on the amendments and accompanying legislative history and did not consider the §1346(a)(1), §1491(a)(1), and §7422(a) jurisdictional scheme nor the relationship of that scheme to the Tax Court's limited jurisdiction under §7442. App. 13-15.

The Federal Circuit's conclusion is at odds with the carefully crafted scheme of tax jurisdiction set out by Congress and this Court and is directly at odds with the Fifth Circuit's decision in *Beall*. That split in authority over the fundamental jurisdiction of the courts is irreconcilable. The analysis by the two circuits are in diametric disagreement, and the Federal Circuit acknowledges its complete disagreement with the Fifth Circuit. App. 16.

The issue in this case – whether taxpayers have recourse in a refund suit in the Court of Federal Claims if the IRS fails or refuses to abate interest that has accrued as a result of IRS errors or delays in performing a ministerial act – is exactly the same issue in *Beall* and is controlled by

the same jurisdictional and Internal Revenue Code sections and judicial precedent.

3. The Jurisdictional Facts Are Uncontested

Only the facts relevant to establishing jurisdiction were set out below. App. 4-5. The Federal Circuit specifically noted that the facts are not disputed. App. 4.

The Hincks filed a joint federal income tax return for 1986. Ten years later, in May 1996, while their 1986 return was under investigation by the IRS, the Hincks made an advance remittance of $93,890.00 towards any income tax deficiency for that year. The IRS later assessed $16,409.00 in additional tax and $21,669.22 in interest against the Hincks for 1986.On February 14, 2000, the IRS applied the advance remittance to the total amount owed by the Hincks and refunded them the balance of $55,811.78. On June 14, 2000, the Hincks filed a claim for refund under §6404(e)(1) for interest from March 21, 1989 until April 1, 1993, due to IRS errors and delays. The IRS denied the Hincks' request on April 30, 2001.

On April 20, 2003, the Hincks filed suit in the United States Court of Federal Claims under §§1346(a)(1) and 1491(a)(1) seeking review of the IRS's refusal to abate the interest and refund of the overpayment. The government moved to dismiss the suit for lack of jurisdiction under RCFC 12(b)(1). On February 3, 2005, the Court of Federal Claims granted the government's motion and dismissed the Hincks' §6404(e)(1) suit for lack of jurisdiction. Judgment was entered February 4, 2005. On March 17, 2005, the Hincks paid the fees and timely appealed to the Federal Circuit under 28 U.S.C. §1295(a)(3).

On May 4, 2006, the Federal Circuit issued its opinion affirming the dismissal for lack of jurisdiction.

REASONS TO GRANT THE PETITION

The decision of the Federal Circuit expressly conflicts with the prior decision of the Fifth Circuit on the same issue – whether the 1996 grant of jurisdiction to the Tax Court at 26 U.S.C. §6404(h) is exclusive over all §6404(e)(1) cases and thus deprives the district courts and Court of Federal Claims of jurisdiction over §6404(e)(1) refund claims. The Federal Circuit's decision left investors within the same partnership with completely different rights and remedies depending on the court in which their case is currently pending. In addition to the AMCOR related §6404(e)(1) decisions at issue, over one hundred other decisions have been issued by various district courts, the Court of Federal Claims, and the Tax Court since the 1996 amendments. The particular issues in this petition have been actively litigated in the district courts and Court of Federal Claims with a plethora of approaches and outcomes. This issue begs for guidance and is not likely to resolve itself.

1. There is a Direct and Express Conflict Between the Fifth Circuit and the Federal Circuit On the Same Issue

The Federal Circuit expressly recognized that its holding is contrary to the Fifth Circuit's decision in *Beall*. App. 16. The two courts split not only on the ultimate determination over whether the Tax Court has exclusive jurisdiction over §6404(e)(1) claims, but in their conclusions with respect to the underlying issues as well. The split is clear and irreconcilable.

a. The Two Courts Have Approached the Issue from Irreconcilable Positions and the Decision of the Federal Circuit Cannot Be Squared With Jurisdictional Statues or This Court's Precedent

The Federal Circuit did not look to or consider the Court of Federal Claims' general grant of jurisdiction at §1346(a)(1) and §1491(a)(1). That court looked only to the language of §6404(h) to determine that Congress intended the Tax Court to be the sole forum for §6404(e)(1) claims. App. 11-12. In summary, the Federal Circuit was persuaded that the grant of jurisdiction was exclusive because the statute references only the Tax Court. App. 12. The Federal Circuit "confirmed" its view by citing this Court's precedent regarding judicial deference to administrative agency determinations and concluded that Congress intended the Tax Court to have exclusive jurisdiction to review §6404(e)(1) denials because of its tax expertise. App. 13-14.

In *Flora*, the government urged this Court to adopt the same "plain language" approach. This Court declined, noting that if the statutory language alone was so clear, then presumably the courts "could but recite the statute and enter judgment" and "might be pardoned some perplexity as to how such a simple matter could have caused so much confusion."[11] But this Court recognized that "this facile an approach will not serve" with respect to a question of such considerable importance in the administration of the tax laws.[12]

The Fifth Circuit examined the jurisdictional challenge within the general jurisdictional scheme. App. 20-26. The Fifth Circuit correctly held that reading the grant of jurisdiction to the Tax Court as exclusive of jurisdiction in

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[11] *Flora* at 148.

[12] *Flora* at 148.

the district courts was inconsistent with the general structure of the Internal Revenue Code and the jurisdictional limitations on the Tax Court. After exhaustive analysis, the Fifth Circuit concluded that claims for refund of interest under §6404(e)(1) fit squarely within the jurisdictional grant at §1346(a)(1) and sovereign immunity was waived by §7422(a). The Fifth Circuit joined the other circuits that had earlier reached the same conclusion. App. 26. The Fifth Circuit further concluded that the 1996 amendments clarified that Congress intended the decision to abate interest was no longer discretionary. App. 30.

In considering the impact of the grant of jurisdiction to the Tax Court, the Fifth Circuit followed this Court's precedent that district courts (and the Court of Federal Claims) have *refund* jurisdiction over disputed taxes, while the Tax Court generally has *prepayment* jurisdiction over disputed taxes.[13] App. 36. As the Fifth Circuit recognized in *Beall*, there are two general forums for resolving federal tax controversies: (i) filing suit in the Tax Court before paying the tax[14], or (ii) paying the tax and then filing a refund suit in federal district court or the Court of Federal Claims. [15] App. 36. The Tax Court has refund jurisdiction only when an action is already pending before it in a disputed tax deficiency case and in some limited instances §6404(e)(1)

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[13] *Flora v. U.S.*, 362 U.S. 145, 149 (1960)

[14] The Tax Court does have limited overpayment jurisdiction in certain circumstances. If a prepayment petition is filed in the Tax Court to contest a tax deficiency, the Tax Court then acquires limited additional jurisdiction to make overpayment determinations related to the deficiency determination *that is at issue in the petition* . §6512(b). Section 6404(h)(2)(B) states that "[r]ules similar to the rules of §6512(b) apply for purposes of this subsection." It also has limited refund jurisdiction over interest overpayments under §7481(c).

[15] §6213; §1346(a)(1); *Flora*, 362 U.S. at 157.

errors and delays.[16] App. 36.

When faced with an IRS proposal to assess tax, penalties or *interest*, *Flora* recognized that the broad language of §§1346(a)(1) and §1491(a)(1) grant the district courts and the Court of Federal Claims subject matter jurisdiction over all taxpayer defenses and challenges to those assessments, but only if the taxpayer first pays the full amount of the assessment and files a refund claim.

Alternatively, a taxpayer can escape the harsh prepayment requirement and file suit in the Tax Court to challenge the proposed tax deficiency, penalty, or in limited cases to abate interest under §6404(e). But the Fifth Circuit recognized and was persuaded that the Tax Court, by statute has extremely limited jurisdiction and has "only such power to adjudicate controversies as is conferred upon it by the Internal Revenue Code."[17] App. 36-37. This is so because the Tax Court lacks a "general" grant of jurisdiction similar to §1346(a)(1) or §1491(a)(1). The statute conferring subject matter jurisdiction to the Tax Court, 26 U.S.C. §7442, confines and limits the Tax Court's jurisdiction to the matters expressly and specifically parsed out, section by section in the Internal Revenue Code[18] – such as the explicit limited grant of jurisdiction over §6404(e)(1) cases set out at §6404. There is no precedent for reading these discrete limited jurisdictional grants under §7442, which are required to be expressly set out in the Tax Code, as exclusive to the Tax Court depriving the district courts and Court of Claims of their general refund jurisdiction. There

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16 §6512, §7481(c) and §6404(h)(2)(B); *508 Clinton St.* at 355.

17 *Continental Equities, Inc. v. C.I.R.*, 551 F.2d 74, 79 (5th Cir. 1977), *aff'g in part & rev'g in part* T.C. Memo 1974-189.

18 *Estate of Baumgardner v. C.I.R.*, 85 T.C. 445 (1985)("Our jurisdiction is limited by statute (section 7442)...").

is especially no precedent that these discrete provisions deprive the district courts or Court of Federal Claims of acknowledged and well-settled jurisdiction.

Consequently, it is well settled that the Tax Court lacks jurisdiction over refund suits, except those brought in conjunction with a deficiency proceeding or, in limited circumstances, §6404(e)(1) suits brought under §6404(h)(1). *Id.* Section 6404(h)(2) grants the Tax Court refund jurisdiction pursuant to the rules established at §6512(b) to determine an overpayment in a §6404(h)(1) case.

It is also well settled that the Tax Court generally lacks jurisdiction to make interest determinations, except those brought in conjunction with a tax deficiency proceeding. *Id.* Therefore, it was necessary for Congress to add §6404(h) to expressly grant the Tax Court any prepayment jurisdiction over requests for interest abatement brought pursuant to §6404(e)(1).[19] Otherwise, taxpayers who did not dispute the proposed tax assessment but did dispute the interest abatement issue would have no prepayment opportunity to assert their right to challenge the excessive interest pursuant to §6404(e)(1). Section §6404(h)(1) is a grant of prepayment jurisdiction.

In contrast, the Tax Court held it totally lacked subject matter jurisdiction over prepayment §6404(e)(1) claims and, in the limited cases where it had overpayment jurisdiction, it followed the circuit courts' analysis that §6404(e)(1) was discretionary and, therefore, beyond the scope of judicial

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[19] *508 Clinton, supra.* (recognizing that Tax Court jurisdiction is limited by §7442, as a general rule the Tax Court lacks jurisdiction over interest, holding the Tax Court lacked jurisdiction over §6404(e)(1) claims in a deficiency proceeding, and suggesting that Congress could rectify the lack of jurisdiction with an express, statutory grant of jurisdiction).

review.[20]

When Congress has chosen to create exclusive jurisdiction and/or limit §1346(a)(1) and §1491(a)(1) jurisdiction it has used appropriate statutory language.[21] Had Congress intended to do so here it would have.

The Federal Circuit was presented with the same arguments and authorities as the Fifth Circuit but declined to reach or consider these issues and consequently issued a decision contrary to the better reasoned and more authoritative decision issued by the Fifth Circuit.

b. The Two Courts Disagree on the Conclusions to be Drawn from Legislative History

With respect to the legislative history to the §6404 amendments, both courts considered the House Report accompanying TBOR2,[22] but reached completely different, irreconcilable conclusions. The Federal Circuit only analyzed the language of the Report. App. 13-17. The Fifth Circuit considered that same language, but in the context of precedent and the existing jurisdictional scheme for tax litigation. App. 32-37.

The Federal Circuit was persuaded that Congress' statement of "Present Law" in the first sentence of the legislative history to the amendments – "Federal courts

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[20] *See, 508 Clinton Street Corp., v. C.I.R..*, 89 T.C. 352 (1987); *Asciutto v. C.I.R.*, 64 T.C.M. 877 (1992); *Bax v. C.I.R.*, 13 F.3d 54, 57 (2 nd Cir. 1993).

[21] See §6110(j)(1)(B) (Taxpayer "shall have as an **exclusive** civil remedy an action against the Secretary in the United States Claims Court." [Emphasis added.] See also §7422(a) and §6511(a) which expressly limit refund jurisdiction and condition the waiver of immunity. Section 6404 has no such statutory language of exclusion or limitation.

[22] H.R.Rep. No. 104-506, at 28 (1996). App. 62.

generally do not have jurisdiction to review the IRS's failures to abate interest." – was a plain declaration that the courts lack §6404(e)(1) jurisdiction. App. 13-15.

In a more nuanced reading that recognized the actual holdings in the early §6404(e)(1) cases, the Fifth Circuit concluded from that statement that Congress was aware of the *Horton Homes* line of cases and was aware those cases had not held that federal courts lacked "jurisdiction," but were precluded from exercising their jurisdiction over §6404(e)(1) claims. App. 32-34. The Fifth Circuit's approach follows the presumption that Congress acts with knowledge of existing law and judicial concepts and if Congress intends to change the judicial interpretation or concept, it makes that intent specific – which Congress did not do.[23]

The Federal Circuit was also persuaded that the Committee's failure to mention or expressly grant jurisdiction to the district courts and the Court of Federal Claims in the legislative history, while in contrast plainly granting the Tax Court jurisdiction to consider interest abatement claims, meant that Congress intended to vest jurisdiction exclusively in the Tax Court. App. 11-12, 14. But, as discussed above, there is no supporting precedent for that approach.

In contrast, the Fifth Circuit drew a different conclusion and was persuaded that "Congress nowhere stated in the 1996 amendments that the district courts *did not* have jurisdiction to review interest abatement denials." App. 33.

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[23] *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 382, n. 66, 102 S.Ct. 1825, 1841, n. 66, 72 L.Ed.2d 182 (1982); *Lorillard v. Pons*, 434 U.S. 575, 580-581, 98 S.Ct. 866, 869-870, 55 L.Ed.2d 40 (1978). *See also Midlantic Nat'l Bank v. N.J. Dep't Envtl. Prot.*, 474 U.S. 494, 501, 106 S.Ct. 755, 88 L.Ed.2d 859 (1986); *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 266-67, 99 S.Ct. 2753, 61 L.Ed.2d 521 (1979).

Moreover, the court relied on the Report's express direction that "[n]o inference is intended as to whether under present law any court has jurisdiction to review IRS's failure to abate interest." App. 33. The Fifth Circuit also specifically noted that reading the absence of a reference to district courts as an exclusive grant of jurisdiction to the Tax Court – the approach urged by the government and later adopted by the Federal Circuit – would impliedly repeal the district courts' (and the Court of Federal Claims') existing jurisdiction. App. 34. The Fifth Circuit cited and followed this Court's precedent that repeals by implication are disfavored.[24] App. 34.

Finally, the Federal Circuit erroneously buttressed the conclusions it drew from the legislative history to the 1996 amendments by referencing ambiguous language in the legislative history to a later proposed, but never passed, Taxpayer Bill of Rights 2000.[25] App. 14-15. The legislation to which that Report relates, H.R. 4163, was never enacted.[26] As this Court has said, "unenacted approvals, beliefs, and desires are not laws."[27] To borrow from Justice

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[24] *See Traynor v. Turnage*, 485 U.S. 535, 108 S.Ct. 1372, 99 L.Ed.2d 618 (1988).

[25] H.R.Rep. No. 106-566, at 32 (2000). App. 64.

[26] H.R. 4163 passed the House on April 11, 2000, and was referred to the Senate on April 12, 2000. The legislation never left the Senate Finance Committee.

[27] *Puerto Rico Dept. of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 501, 108 S.Ct. 1350, 1354, 99 L.Ed.2d 582 (1988). *See also Ratzlaf v. U.S.*, 510 U.S. 135, n.18, 114 S.Ct. 655, 126 L.Ed.2d 615 (1994)("We do not find that Report, commenting on a bill that did not pass, a secure indicator of congressional intent at any time, and it surely affords no reliable guide to Congress' intent in 1986. See *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 758, 99 S.Ct. 2066, 2072, 60 L.Ed.2d 609 (1979) (cautioning against giving weight to "history" written years after

Scalia, "[t]oday's opinion ever-so-carefully analyzes, not legislative history, but the history of legislation-that-never-was. ... This is beyond all reason, and we should say so."

2. The Federal Circuit's Approach Is not Supported by Clear and Convincing Evidence

"We begin with the strong presumption that Congress intends judicial review of administrative action." [28] The government bears a "heavy burden" of proof when arguing against the presumption in favor of review.[29] Congress intended that citizens should be denied judicial access only where the government has produced "clear and convincing" evidence against judicial review.[30]

The pre-TBOR2 §6404(e)(1) cases recognized the presumption in favor of judicial review of agency actions and that this presumption can only be overcome by clear and convincing evidence of contrary legislative intent. [31] "Clear and convincing" evidence requires that the existence

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the passage of a statute)").

[28] *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670, 106 S.Ct. 2133, 90 L.Ed.2d 623 (1986), *citing Abbott Laboratories v. Gardner*, 387 U.S. 136, 140, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967), LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 339-353 (1965), and *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163, 166, 2 L.Ed. 60 (1803).

[29] *Bullard v. Webster*, 623 F.2d 1042, 1045 (5th Cir. 1980) ("[B]urden of proving nonreviewability is [on] agency involved."), *citing Abbott Labs.*

[30] *Brahms v. U.S.*, 18 Cl.Ct. 471, 475 (1989), *citing Abbott Labs*, 387 U.S. at 140-41; *Kirby Corp. v. Pena*, 109 F.3d 258, 261-262 (5th Cir. 1997), *citing Bowen* at 670; and *Dunlop v. Bachowski*, 421 U.S. 560, 567, 95 S.Ct. 1851, 44 L.Ed.2d 377 (1975).

[31] *Brahms* at 475; *Argabright* at 476; *Selman* at 1064; *Horton Homes* at 551.

of the disputed fact be "highly probable."[32] It is "evidence so clear, direct and weighty and convincing as to enable the fact finder to come to a clear conviction, without hesitancy, of the truth of the precise facts of the case."[33]

The Federal Circuit's repeal by implication is not supported by "clear and convincing evidence." Its approach and final decision are contrary to the general scheme of jurisdiction and not consistent with legislative history properly read in the context of that jurisdictional scheme.

3. The Conflict is Not Likely to be Resolved Without this Court's Guidance

As can be seen from the number of §6404(e)(1) decisions filed by the district courts and Court of Federal Claims since 1996, this is an actively litigated issue.[34]

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[32] *Am. Pro. Protective Agency, Inc. v. U.S.*, 281 F.3d 1234, 1240 (Fed. Cir. 2002).

[33] *Cruzan by Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 285 n. 11, 110 S.Ct. 2841, 111 L.Ed.2d 224 (1990).

[34] *U.S. v. Davenport*, ___ F.Supp.2d ___, 2006 WL 1555845 (W.D. OK, June 5, 2006)(recognizing 10th Circuit precedent in *Selman* but following *Hinck* in an action filed by *pro se* taxpayers); *Ballhaus v. I.R.S..*, 341 F.Supp.2d 1145 (D.Nev.2005)(action filed by *pro se* taxpayer); *Kraemer, supra.* (issued prior to *Beall* and overturned on consolidated appeal at *Weiner*, 389 F.3d 152; *Dogwood Forest Rest Home, Inc. v. U.S.*, 181 F.Supp.2d 554 (M.D.N.C.2001)(issued prior to *Beall*); *Davies v. U.S.*, 124 F.Supp.2d 717 (D.Me.2000)(issued prior to *Beall*); *Henderson v. U.S.*, 95 F.Supp.2d 995 (E.D.Wis.2000)(issued prior to *Beall*). *Leiter v. U.S.*, 2004 WL 303210 (D.Kan.)(following *Beall*); *Hudson v. I.R.S.*, 2004 W.L. 1006266 (N.D.N.Y.)(*in dicta*, §6404(e)(1) discretionary with IRS); *U.S. v. Ripa*, 323 F.3d 73 (2nd Cir. 2003)(in *dicta*, 1996 amendments reinforces holding in *Bax* that §6404(e)(1) determination is solely discretionary with the IRS); *Brewer v. Baugh*, 370 F.Supp.2d 988 (D.Ariz.,2005) (following *Ballhaus*, §6404(e)(1) is discretionary and Tax Court has exclusive jurisdiction); *In re 1900 M Restaurant Assoc., Inc.*,319 B.R. 302 (Bkrtcy,.D.Dist.Col., 2005)(noting *Beall* with favor in *dicta*); *Hirshfield v.*

The Federal Circuit was persuaded that its approach was correct because its decision was consistent with five other district court decisions that also concluded the Tax Court has exclusive jurisdiction over §6404(e)(1) claims. App. 7-8. But the Federal Circuit's reliance on that subordinate authority is misplaced. Three of those district court decisions were issued prior to *Beall* and their analysis was also void of any reference to or consideration of the well-settled and accepted jurisdictional scheme for resolving tax controversies.[35] One of those district court decisions was expressly overturned on appeal pursuant to *Beall*.[36] The fifth decision was issued against an unsophisticated, *pro se* plaintiff who was not familiar with tax law or procedure.[37]

In general, federal appellate courts accord great weight to the decisions of their sister circuits when the same or similar issues come before them and they do not create conflicts among the circuits without strong cause.[38] Further they have long recognized that the need for uniformity applies with special force in tax cases.[39] Such uniformity among the circuits is particularly desirable in tax cases to

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U.S, 2001 WL 579783 (S.D.N.Y.,2001)(unpublished, holding §6404(e)(1) totally discretionary) *In re Karlsson* 247 B.R. 321 (Bkrtcy.M.D.Fla., 2000) (holding §6404(e)(1) totally discretionary - issued before *Beall*).

35 *Dogwood Forest, supra.*, (issued prior to *Beall*); *Davies, supra.*, (issued prior to *Beall*); *Henderson, supra.*, (issued prior to *Beall*).

36 *Kraemer*, reversed in consolidated appeal under *Weiner, supra*.

37 *Ballhaus, supra*

38 *Admiral Financial Corp. v. U.S.*, 378 F.3d 1336, 1340 (Fed. Cir. 2004) *citing Washington Energy Co. v. U.S.*, 94 F.3d 1557, 1561 (Fed.Cir.1996).

39 *Washington Energy* at 1561, and cases cited therein.

ensure equal application of the tax system to all citizens, and federal appellate courts should not reach a result in conflict with a sister circuit unless the statute at issue or precedent of that court gives them no alternative.[40]

The divergent approaches and conclusions reached in those five cases and in the other §6404(e)(1) refund cases decided since 1996, graphically illustrates just how badly the uniformity that is particularly desirable in tax cases has been shattered with respect to this issue. These fractures can only be resolved with this Court's guidance.

The Federal Circuit's holding also has broader implications, foreshadowing challenges to the district courts' and Court of Federal Claim's jurisdiction in other areas of the tax law. This is especially likely where the Tax Court's §7442 specific grants of jurisdiction have historically been treated as creating concurrent jurisdiction with courts that have pre-existing jurisdiction over that same issue. The ramifications of allowing the Federal Circuit's determination to stand illustrates why this issue is one of such importance that it demands this Court's review and guidance.

4. <u>The Conflict Is Over an Important Matter that Demands the Court's Attention</u>

a. The Federal Circuit's Decision Unhinges the Well-Established, Integrated, and Uniform Jurisdictional Scheme Between the District Courts and the Court of Federal Claims

While uniformity in the tax laws in general is a goal that this Court is mindful of, the mandate for uniformity between the jurisdiction of the district courts and the Court of Federal Claims is of specific importance. As this Court

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[40] *Washington Energy* at 1561, citing *Gibraltar Fin. Corp. v. U.S.*, 825 F.2d 1568, 1572 (Fed.Cir.1987).

has pointed out, Congress passed the Tucker Act to provide for expeditious and orderly determination of claims against the government.[41] This relief "demanded an integrated jurisdictional plan" between the Court of Federal Claims and the district courts and "[u]niformity and equality in substantial rights and privileges – for claimants in both forums – were essential features of the system. Distinctions between the opportunities for recovery afforded in the two forums would have tended to mar the symmetry of the plan and to impair its effective and successful operation." *Id.* Based on Mr. Tucker's statements in the legislative history to §§1346(a)(1) and 1491(a)(1), this Court has held that the substantial rights of claimants are to be governed alike in the Court of Federal Claims and the district courts. *Id.*

The split in this case is not a mere difference of opinion between the courts regarding standards of review or factors to be considered in making a determination on the merits. The split in this case has fundamentally severed the integrated, uniform jurisdictional plan between the district courts and the Court of Federal Claims. Taxpayers now have the right to file a §6404(e)(1) refund suit in the district courts of the Fifth Circuit if there is personal jurisdiction but not in the court that was specifically created to allow plaintiffs to sue the government regardless of personal jurisdiction or venue.

b. The Federal Circuit's Decision Displaces the Keystone of the Carefully Articulated and Complex Jurisdictional Scheme of Tax Laws

In *Flora*, this Court construed §1346(a)(1) and also articulated the crux of this case, "We are not here concerned with a single sentence in an isolated statute, but rather with a jurisdictional provision which is a keystone in a

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41 *Bates Mfg. Co. v. U.S.*, 303 U.S. 567, 570-71, 58 S.Ct. 694, 82 L.Ed. 1020 (1938).

carefully articulated and quite complicated structure of tax laws."[42] The Federal Circuit's decision below undoes this jurisdictional scheme.

By expansively holding that the specific grant of jurisdiction allowing the Tax Court to make determinations with respect to some limited §6404(e)(1) claims also gives the Tax Court exclusive jurisdiction over all §6404(e)(1) claims, the Federal Circuit has impliedly repealed §1346(a)(1) in every instance where the Tax Court has been granted concurrent jurisdiction with the district courts and the Court of Federal Claims over a particular issue.

For example, §6621(c) (now repealed but still effective for tax returns due prior to 1990 and at issue in the AMCOR cases) imposed an increased "penalty" rate of interest on substantial underpayments attributable to tax motivated transactions (TMTs). Congress expressly gave the Tax Court jurisdiction in §6621(c)(4) to make prepayment TMT interest determinations in a partner's individual tax deficiency case even though it does not normally have jurisdiction to determine interest.[43] The Tax Code is silent with respect to district court and Court of Federal Claims jurisdiction over §6621(c). But the fact that this grant was made does not automatically mean the Tax Court has exclusive jurisdiction over the §6621(c) issue. The IRS has never asserted that §6621(c)(4) is an exclusive grant of jurisdiction to the Tax Court. The case law is replete with prepayment §6621(c) suits in the Tax Court and post-payment §6621(c) refund suits in the federal

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42 *Flora*, 362 U.S. at 157.

43 *508 Clinton Street Corp*, at 356 and n.9.

district courts and Court of Federal Claims.[44] The Tax Court has recognized it can only hear a §6621(c) refund claim in a case already pending pursuant to its general tax deficiency jurisdiction.[45]

When an express grant of jurisdiction to the district courts and/or Court of Federal Claims is necessary, Congress does so. For example, 26 U.S.C. §6330(d)(1)(A) expressly grants the Tax Court jurisdiction to review an IRS collection due process determination. Federal district courts and Court of Federal Claims do not have §1346(a)(1), §1491(a)(1), or other jurisdiction over collection due process determinations. Consequently, it was necessary for Congress to expressly grant those courts jurisdiction, which it did at §6330(d)(1)(B). Section 6330(d)(1)(B) grants the district courts jurisdiction in the event the Tax Court does not have jurisdiction over the underlying tax liability.[46]

The Federal Circuit's decision would deny the district courts and the Court of Federal Claims jurisdiction not only over §6404(e)(1) refund claims, but also over 26 U.S.C. §6621(c) refund claims, as well as a host of other discrete claims. The holding is potentially far reaching, and this Court should expect the IRS will make the most of it to deny taxpayers access to the district courts and Court of Federal Claims in cases other than §6404(e)(1) cases.

The Court should expect the IRS and the courts to

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[44] *E.g. Hirschfield v. U.S.*, 2001-2 USTC ¶50,480, ___ F.Supp.2d ___ (E.D.N.Y. 2001) (a post payment refund suit filed in federal district court) and *Heasley v. C.I.R.*, 902 F.3d 380 (5th Cir. 1990) (a prepayment suit filed in Tax Court).

[45] *Barton v C.I.R.*, 97 T.C. 548 (1991), *citing White v. C.I.R.*, 95 T.C. 209 (1990).

[46] *Gorospe v. Commissioner*, ___ F.3d ___, 2006 WL 1687398 (9th Cir. June 21, 2006).

exploit the weaknesses in the Federal Circuit's decision. Until the 1996 amendments and *Beall*, §6404 interest abatement had historically been the *only* provision of the Tax Code held to be totally discretionary with the IRS. But the IRS recently, *albeit* unsuccessfully, used these same arguments in an attempt to expand its total discretion over §6015(f) equitable innocent spouse relief by asserting that judicial review was barred.[47] The IRS relied on the *Argabright* cases, including *Selman* and *Horton Homes,* to support its defense. With the exception of one bankruptcy court, every reviewing court has held equitable innocent spouse elections are not totally discretionary using the same analysis advanced by the Hincks and the Bealls and adopted by the Fifth Circuit.[48]

For example, in *Butler* the IRS asserted the Secretary's authority to grant equitable relief was totally discretionary. But the Tax Court recognized that the "committed to agency discretion" exception to the general rule of judicial review is very narrow and applies only in those rare instances where the statute is drawn in such broad terms that there is no law to apply.

The Tax Court held that "we are well equipped to decide whether it was an abuse of discretion for [the IRS] to deny relief to petitioner under §6015(f)."[49] The Tax Court and Court of Federal Claims all rejected the IRS's attempt to limit judicial review of its innocent spouse determination

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47 §6015(f).

48 See *Butler v. C.I.R.*, 114 T.C. 276 (2000) (rejecting the IRS's *Argabright* defense); *cf. In re Mira*, 245 Bankr. 788 (Bankr. M.D. Pa. 1999).

49 *Butler* at 291-292.

and followed the *Butler* analysis and holding.[50]

c. The Federal Circuit's Decision is Contrary to Congressional Intent to Expand Taxpayer Rights and Access to Judicial Review of §6404(e)(1) Claims

The legislative history to §6404(e)(1) proves Congress believed the IRS was "inappropriately" charging interest as a result of its own errors and delays and meant for the IRS to abate that interest. Unfortunately, the IRS refused to self-correct and 10 years later Congress was forced to use TBOR2 to rectify the IRS's continuing refusal to exercise its §6404(e)(1) abatement authority.

The overview of the legislative history to the original enactment of §6404(e)(1) clearly favors review: "After nearly a year of hearings, the committee concluded that only the most thorough reform could assure a simpler, fairer, and more efficient tax system which could regain the trust of the American people."[51]

The specific history to §6404(e)(1) is even more insistent:

> Under present law, the IRS does not generally have the authority to abate interest charges where the additional interest has been caused by IRS errors and delays.... In some cases, the IRS has admitted that its own errors and delays have caused taxpayers to incur additional interest charges. ... The committee believes that where an IRS official acting in his official capacity fails to perform a ministerial act, ... authority should be available for

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[50] *Fernandez v. C.I.R.*, 114 T.C. 324 (2000); *Charlton v. C.I.R.*, 114 T.C. 333 (2000); *Flores v. U.S.*, 51 Fed. Cl. 49 (2001).

[51] H.R. CONF. REP. 99-841, Overview (1985).

> the IRS to abate the interest independent of the underlying tax liability.[52]

In *Banat* the Tax Court correctly found that the objective of TBOR2 with regard to §§6404(e) and (h) was to *expand*, not restrict, taxpayers' rights and access to judicial review:

> TBOR2 is intended by the Congress "to **provide for increased protections** of taxpayer rights in complying with the Internal Revenue Code and in dealing with the Internal Revenue Service (IRS) in its administration of the tax laws." H.Rept. 104-506, at 22 (1996)-2 C.B.– [53]

Any assertion that TBOR2 was intended to restrict taxpayer rights to judicial review and relief is antithetic to the bill's true purpose and should be rejected by this Court.

d. The Federal Circuit's Decision Impermissibly Denies Taxpayer's Due Process

Both Circuits recognized that repealing the existing §6404(e)(1) refund jurisdiction of the district courts and Court of Federal Claims would cause two anomalies: (i) a taxpayer's right to judicial review of the IRS's abatement denials would be determined solely by his net worth, and (ii) certain taxpayers would be forced to "split" their claims. App. 16-17, 36-37. But both anomalies violate taxpayer constitutional due process rights.

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[52] H.R. CONF. REP. 99-841, 4898-4899 (1985). App. 57-58.

[53] *Banat v. C.I.R.*, 79 TCM (CCH) 1941 (2000), *aff'd on other grounds without published opinion* 2001-1 USTC ¶50,296 (2nd Cir. 2001). [Emphasis added.] The Tax Court hears pre-1996 claims and decides them using the pre-1996 version of §6404(e).

i. The Federal Circuit's Interpretation Violates the Constitutional Due Process Rights of All Individual Taxpayers with a Net Worth of Over $2,000,000 and Other Taxpayers with a Net Worth over $7,000,000

Section 6404(h) grants the Tax Court jurisdiction to review for abuse of discretion IRS decisions not to abate interest under §6404(e)(1), but only "jurisdiction over any [such] action brought by a taxpayer who meets the requirements referred to in §7430(c)(4)(A)(ii)." App. 42. Section 7430(c)(4)(A)(ii) requires that the taxpayer meet "the requirements of §2412(d)(2)(B) of such title 28." App. 49. Section 2412(d)(2)(B) provides, *inter alia*, that "'party' means (i) an individual whose net worth did not exceed $2,000,000 at the time the civil action was filed, or (ii) [other entities, including corporations] the net worth of which did not exceed $7,000,000 at the time the civil action was filed ...." App. 54.

Both the Fifth Circuit and the Federal Circuit recognized that if §6404(h) gave the Tax Court exclusive jurisdiction over all IRS denials of §6404(e)(1) abatement claims then individual taxpayers with a net worth of under $2,000,000 would be allowed judicial review in the Tax Court; taxpayers with a net worth of over $2,000,000 "would be left entirely without recourse." App. 4,16,36 fn. 15, 37. In *Beall* the Fifth Circuit found this denial of rights based solely on personal wealth unacceptable. App. 37. In *Hinck* the Federal Circuit rejected the Fifth Circuit's concerns and stated that by granting prepayment review in the Tax Court but restricting it to "certain taxpayers," those with a net worth of less that $2,000,000, Congress intended to deny taxpayers with a net worth of over $2,000,000 not only a prepayment forum but any forum whatsoever by simultaneously repealing the existing, *albeit* previously unavailable, refund jurisdiction of the district courts and Court of Federal Claims. App. 16.

The Federal Circuit's interpretation results in an improper taking or conversion of the rights of certain taxpayers, individuals with a net worth over $2,000,000 and probably most corporations, to judicial review when the IRS denies their §6404(e)(1) abatement requests, and violates their substantive and procedural due process rights by denying them any forum in which to raise their claim. [54] This is wholly inconsistent with the grant of relief under §6404(e)(1) being unrestricted to all taxpayers. The restriction only appears in §6404(h) which creates the grant of payment jurisdiction to the Tax Court.

An individual's right to pursue legal redress for claims with a reasonable basis in law and fact is fundamental and protected by numerous provisions of the Constitution[55] including: the Due Process Clauses of the 5 th [56] and 14th [57]Amendments, the Equal Protection Clause,[58] the 6th Amendment,[59] the Privileges and Immunities Clause of

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[54] As a result, there would be no IRS accountability for denying §6404(e)(1) abatement requests made by high net worth individual and corporate taxpayers. *I.R.S. v. Blais*, 612 F.Supp. 700 (D.Mass.1985) ("The law abhors power without accountability. Unpoliced power invites abuse and corruption.").

[55] *Chambers v. Baltimore & Ohio RR Co.*, 207 U.S. 142, 148, 28 S.Ct. 34, 35, 52 L.Ed. 143 (1907).

[56] *Am. Pelagic Fishing Co. v. U.S.*, 379 F.3d 1363, 1371 (Fed. Cir. 2004).

[57] *Bounds v. Smith*, 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977); *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, 741, 103 S.Ct. 2161, 2169, 76 L.Ed.2d 277 (1983).

[58] *Pennsylvania v. Finley*, 481 U.S. 551, 557, 107 S.Ct. 1990, 1994-95, 95 L.Ed.2d 539 (1987).

[59] *Johnson v. Avery*, 393 U.S. 483, 89 S.Ct. 747, 21 L.Ed.2d 718 (1969); *Ex Parte Hull*, 312 U.S. 546, 61 S.Ct. 640, 85 L.Ed. 1034 (1941).

Article IV,[60] and the 1st Amendment protection of the right to petition.[61] The Due Process Clause of the 14th Amendment guarantees access to both state and federal courts.[62] This right cannot be infringed upon or burdened.[63] A court of competent jurisdiction is required for legal redress.[64]

Denying only certain taxpayers *any* forum to raise their §6404(e)(1) abatement claim is improper when "under the law there is no other court to which they could go ... [and] could amount to a denial of due process under the 14th amendment to the Constitution."[65]

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[60] *Bayou Fleet, Inc. v. Alexander*, 234 F.3d 852, 857 (5th Cir. 2000), *citing Chambers* at 148; *Ryland v. Shapiro* , 708 F.2d 967,971(5th Cir.1983).

[61] *Calif. Motor Transp. v. Trucking Unlimited*, 404 U.S. 508, 510, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972); *Turner v. Safley*, 482 U.S. 78, 84, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987); *E. RR Pres. Conf. v. Noerr Motor Freight Inc.*, 365 U.S. 127, 138, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961).

[62] *DeWitt v.Pail*, 366 F.2d 682, 685 (9th Cir. 1966), *citing Stiltner v. Rhay*, 322 F.2d 314, 316 (9th Cir. 1963); *Brinkerhoff-Faris Trust & Sa s. Co. v. Hill*, 281 U.S. 673, 680, 50 S.Ct. 451, 74 L.Ed. 1107 (1930).

[63] *Silver v. Cormier*, 529 F.2d 161, 163 (D.C.Colo. 1976), *citing Adams v. Carlson*, 488 F.2d. 619, 630 (7th Cir. 1973).

[64] *Fehlhaber v. Fehlhaber*, 681 F.2d 1015, 1027 (5th Cir. 1982).

[65] *Atkins v. U.S.*, 556 F.2d 1028, 1040 (Ct.Cl. 1977) *citing Boddie v. Conn.*, 401 U.S. 371, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971); *Xechem I'natl, Inc. v. Univ. of Texas*, 382 F.3d 1324, 1334-35 (Fed. Cir. 2004) concurring opinion. (In an action for a taking or conversion "a factor in the due process provision of the 14th Amendment is whether any remedy is otherwise available. ... [I]f no remedy is indeed available ... by federal preemption of the cause of action – there can arise an affront to the fundamentals of due process."); *Benedict v. Sec. of Dept. of H.H.S.*, 29 Fed.Cl. 587, 594 (1993) ("[T]he guaranty of due process applies to the

ii. The Forced "Claim-Splitting" Urged by the Federal Circuit is Prohibited

The Fifth Circuit recognized that:

> denying district courts the power to hear claims under §6404(e)(1) would force certain plaintiffs to split their abatement claims from their refund claims, and force them to seek relief in two courts. ... [T]hat taxpayer would have to sever his interest abatement claim from his refund claim and pursue the abatement claim separately in the Tax Court. Such splitting of claims is generally considered undesirable, *see, e.g., In re Super Van, Inc.*, 92 F.3d 366, 371 (5th Cir.1996) (discussing rule against claim-splitting), and we cannot conclude, absent some indication to the contrary, that Congress would have intended such a result. App. 37.

The Federal Circuit again rejected the Fifth Circuit's concerns and stated:

> That the interest abatement claim may have to be separated from a refund claim may not appear to be efficient, but that policy concern does not compel a different statutory construction when the statute seems clear. App. 17.

But this Court has long recognized that such "claim-splitting" is improper because "the first decision would, of course, control."[66] "To discourage [claim-splitting], judges

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judicial branch as well as the legislative, executive, and administrative branches of government.").

66 *Flora* at 165. See also *U.S. v. Shanbaum*, 10 F.3d 305, 314 (5th Cir. 1994):

> "[A taxpayer's] total income tax liability for each taxable year constitutes a single, unified cause of action, regardless of the

award plaintiffs not the better outcome but the first outcome: whichever suit goes to judgment first is dispositive, and the doctrine of claim preclusion (*res judicata*) requires the other court to dismiss the litigation."[67]

By forcing taxpayers to split their claims, the Federal Circuit's interpretation would again cause an unlawful taking or conversion of the taxpayer's right to legal redress as to the claim not decided first.

CONCLUSION

The nature of this administrative action begs for judicial review. For over 10 years the IRS refused to exercise its §6404 interest abatement authority. In 1996, Congress was compelled to make judicial review of IRS abatement determinations explicit to ensure that taxpayers could actually obtain relief from excess interest accrued as a result of IRS errors and delays in performing its ministerial duties. This case is a clear indication that the IRS continues to resist judicial oversight of its determinations with respect to taxpayer rights to interest abatement.

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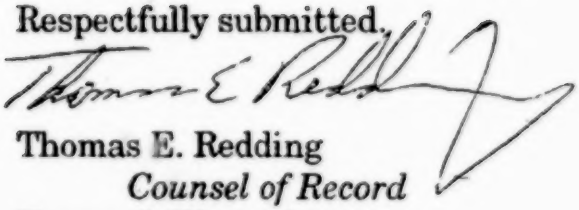
variety of contested issues and points that may bear on the final computation." *Finley v. U.S.*, 612 F.2d 166, 170 (5th Cir.1980). Thus, "if a claim of liability or non-liability relating to a particular tax year is litigated, a judgment on the merits is *res judicata* as to any subsequent proceeding involving the same claim and the same tax year." *C.I.R. v. Sunnen*, 333 U.S. 591, 598, 68 S.Ct. 715, 719, 92 L.Ed. 898 (1948).

67 *Rogers v. Desiderio*, 58 F.3d 299, 300 (7th Cir. 1995).

Respectfully submitted.



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JULY 2006

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App. 1

United States Court of Appeals for the Federal Circuit

05-5099

JOHN F. HINCK and PAMELA F. HINCK,

Plaintiffs-Appellants,

v.

THE UNITED STATES,

Defendant-Appellee.

DECIDED: May 4, 2006

Before LOURIE, LINN, and DYK, Circuit Judges.

LOURIE, Circuit Judge.

John and Pamela Hinck (collectively the "Hincks") appeal from the judgment of the United States Court of Federal Claims dismissing their suit for lack of jurisdiction. Hinck v. United States , 64 Fed.Cl. 71 (Fed.Cl.2005). Because the court lacked subject matter jurisdiction over the Hincks' interest abatement claim, we affirm.

BACKGROUND

Section 6404 of the Internal Revenue Code authorizes the Secretary of the Treasury to abate a tax or liability assessment in certain circumstances.[1] In 1986, Congress

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1 Section 6404(a) of the Internal Revenue Code provides as follows:

(a) General rule-The Secretary is authorized to

amended §6404 by adding a new subsection (e)(1) that, for the first time, authorized the Secretary of the Treasury to grant an abatement of interest assessed against a taxpayer. As originally enacted by the Tax Reform Act of 1986, §1563, Pub.L. No. 99-514, 100 Stat.2085, 2762, §6404(e)(1) provided in its entirety as follows:

> (e) ASSESSMENTS OF INTEREST ATTRIBUTABLE TO ERRORS AND DELAYS BY INTERNAL REVENUE SERVICE.-
>
> (1) In General--In the case of any assessment of interest on--
>
> (A) any deficiency attributable in whole or in part to any error or delay by an officer or employee of the Internal Revenue Service (acting in his official capacity) in performing a ministerial act, or
>
> (B) any payment of any tax described in section 6212(a) to the extent that any delay in such payment is attributable to such an officer or employee being dilatory in performing a ministerial act,
>
> the Secretary may abate the assessment of all or any part of such interest for any period. For purposes of the preceding sentence, an error or delay shall be taken into account only if no significant aspect of such error or delay can be

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abate the unpaid portion of the assessment of any tax or any liability in respect thereof, which-

(1) is excessive in amount, or

(2) is assessed after the expiration of the period of limitation properly applicable thereto, or

(3) is erroneously or illegally assessed.

> attributed to the taxpayer involved, and after the Internal Revenue Service has contacted the taxpayer in writing with respect to such deficiency or payment.

26 U.S.C. §6404(e)(1) (1986).

In 1996, Congress enacted the Taxpayer Bill of Rights II, P.L. 104-168, §301(a), 110 Stat. 1452 (1996), which made two changes to §6404. First, it amended §6404(e)(1) by adding the word "unreasonable" before the words "error or delay" and by changing the words "ministerial act" to "ministerial or managerial act." Those changes to §6404(e)(1) were effective for interest accruing with respect to deficiencies or payments for tax years beginning after July 30, 1996, and thus do not apply to this appeal, which concerns the tax year 1986. Because of the effective date of the §6404(e)(1) change, the original version of §6404(e)(1) thus applies to the Hincks' claim.

The second change involved the addition of the present §6404(h),[2] which provides for review of abatement determinations made by the IRS in the Tax Court as follows:

> The Tax Court shall have jurisdiction over any action brought by a taxpayer who meets the requirements referred to in section 7430(c)(4)(A)(ii) to determine whether the Secretary's failure to abate interest under this section was an abuse of discretion, and may order an abatement, if such action is brought within 180 days after the date of the mailing of the Secretary's final determination not to abate such interest.

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[2] Section 6404(h) was initially designated §6404(g). It was redesignated as §6404(i) by the IRS Restructuring and Reform Act of 1998, Pub L. No. 105-206, and then redesignated as §6404(h) in 2002 by P.L. 107-134, §112(d)(1).

Taxpayer Bill of Rights 2, P.L. 104-168 §301(a) (1996). Section 7430(c)(4)(A)(ii) of Title 26 references 28 U.S.C. §2412(d)(2)(B), and provides that, for purposes of a claim brought under §6404, a taxpayer may not have a net worth of more than $2,000,000 or be the owner of a business worth more than $7,000,000. The addition of §6404(h) applies to requests for abatement submitted to the IRS after July 30, 1996, regardless of the tax year involved, and thus applies to the Hincks' suit. P.L. 104-168 §301(b), (c) (1996).

This appeal arises from a claim by the Hincks to recover tax interest paid for the tax year 1986. The facts are not disputed. The Hincks filed a joint federal income tax return for the tax year 1986. Hinck, 64 Fed.Cl. at 72. Ten years later, in May 1996, while their return for the tax year 1986 was under investigation by the Internal Revenue Service (the "IRS"), the Hincks made an advance remittance of $93,890.00 to the IRS towards any income tax deficiency for that year. *Id.* The IRS later assessed $16,409.00 in additional taxes and $21,669.22 in interest against the Hincks for the taxable year 1986. Id. On February 14, 2000, the IRS applied the advance remittance payment to the total amount owed by the Hincks and refunded them the balance, $55,811.78. Id. On June 14, 2000, the Hincks filed a claim for a refund, which included a request that, to IRS errors and delays, interest assessed against the Hincks should be abated, pursuant to §6404(e)(1) of the Internal Revenue Code, for the period from March 21, 1989, until April 1, 1993. Id. at 72-73. The IRS denied the Hincks' request on April 30, 2001. Id. at 73.

On April 20, 2003, the Hincks filed suit in the United States Court of Federal Claims seeking review of the IRS's refusal to abate the interest. Id. The government moved to dismiss the suit for lack of jurisdiction. On February 3, 2005, the court granted that motion. The court first determined that it possessed subject matter jurisdiction over tax refund claims under the Tucker Act, 28 U.S.C.

§1491(a), which provides that "[t]he United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department ..." Id. at 76. It concluded, however, that it still could not review the IRS's determination whether to abate the interest under I.R.C. §6404(e)(1).

The court noted that prior to 1996, several cases had held that tax abatement determinations under §6404(e)(1) are not judicially reviewable because the IRS has sole discretion to abate interest and there are no tests or standards by which to adjudicate the correctness of the IRS's determination. But, in 1996, §6404 had been amended to include §6404(h), which provides that the Tax Court shall have jurisdiction to review abatement determinations. The trial court analyzed the statutory language of the amended version of §6404 and its legislative history and determined that §6404(h) did not disturb the holdings of the prior decisions, and that the rationale set forth in those decisions that there was no appeal from denial of interest abatement decisions was still applicable. Thus, the court determined that only the Tax Court, not the Court of Federal Claims, could review interest abatement determinations by the IRS.

The Hincks timely appealed the final judgment of the Court of Federal Claims dismissing their action; we have jurisdiction to hear this appeal pursuant to 28 U.S.C. §1295(a)(3).

DISCUSSION

"A decision of the Court of Federal Claims 'to dismiss a complaint for lack of jurisdiction is a question of law subject to ... independent review by this court.' " Texas State Bank v. United States , 423 F.3d 1370, 1375 (Fed.Cir.2005) (quoting Shearin v. United States, 992 F.2d 1195, 1195 (Fed.Cir.1993)).

Whether the Court of Federal Claims has jurisdiction over §6404(e)(1) interest abatement decisions is one of first impression in our court. However, several other circuit and district courts have previously considered the same issue, both before the enactment of §6404(h) in 1996 and subsequent to its enactment. That case law, although not binding on us, is relevant to our analysis, and thus we begin by discussing that authority.

Prior to 1996, several courts had held that district courts had subject matter jurisdiction over §6404(e)(1) claims, but that the Administrative Procedure Act ("APA") barred judicial review of those claims. Argabright v. United States, 35 F.3d 472 (9th Cir.1994); Selman v. United States, 941 F.2d 1060 (10th Cir.1991); Horton Homes, Inc. v. United States, 936 F.2d 548 (11th Cir.1991). In Horton Homes, the Eleventh Circuit held that the district court had subject matter jurisdiction over the taxpayers' interest abatement claim because 28 U.S.C. §1346 states that the "district court shall have original ... of [a]ny civil action against the United States for the recovery of internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal revenue laws"; the court held that the reference in the statute to "tax" included interest imposed on such tax. 936 F.2d at 550. The court also held, however, that the taxpayers' claim was not subject to judicial review because §6404(e)(1) left the interest abatement decision to the Secretary, and the APA specifies that decisions committed to agency discretion by law were not reviewable. Id. at 554.

In Selman, the Tenth Circuit reached the same result through a different interpretation of 28 U.S.C. §1346, reasoning that the taxpayers' §6404(e)(1) claim fell "within the district court's jurisdiction to decide cases regarding

'any sum alleged to have been excessive ... under the internal revenue laws" ' because "any sum" may refer to amounts which are neither taxes nor penalties, and one obvious example of such a "sum" was interest. 941 F.2d at 1062 (citing Flora v. United States, 362 U.S. 145, 149, 80 S.Ct. 630, 4 L.Ed.2d 623 (1960)). The court determined that although it had subject matter jurisdiction to hear a suit for refund of interest under 28 U.S.C. §1346, judicial review of abatement decisions was precluded because Congress meant to commit abatement determinations under §6404(e)(1) to the Secretary's sole discretion. Id. at 1064. The court observed that the language in §6404(e)(1) was permissive and discretionary, stating that the Secretary "may" abate interest, whereas in subsection (e)(2), Congress directed that the Secretary "shall" abate the assessment of all interest on any erroneous refund under §6602. Id. In addition, the court noted that the legislative history of §6404(e)(1) explained that §6494(e)(1) "gives the IRS authority to abate interest but does not mandate that it do so." Id.

Finally, in Argabright, the Ninth Circuit held that district courts had subject matter jurisdiction over interest abatement claims, and relied on Horton Homes and Selman as persuasive authority to hold that the APA proscribed judicial review of the taxpayers' claim. 35 F.3d at 475-76.

Thus, prior to the enactment of §6404(h) in 1996, at least three circuits were in agreement that, while district courts had subject matter jurisdiction over §6404(e) claims, those claims were not subject to judicial review under the APA. Subsequent to the 1996 amendment, however, courts considering that same issue have not been in agreement. On the one hand, several district courts have held that Congress's grant of jurisdiction to the Tax Court to review interest abatement claims in §6404(h) was exclusive and thus withdrew jurisdiction from all other courts. Ballhaus v. Internal Revenue Serv. ____, 341 F.Supp.2d 1145

(D.Nev.2005); Kraemer v. United States , No. CIV. H-00-2948, 2002 WL 575791 (S.D.Tex. Feb.13, 2002); Dogwood Forest Rest Home, Inc. v. United States , 181 F.Supp.2d 554 (M.D.N.C.2001); Davies v. United States, 124 F.Supp.2d 717 (D.Me.2000); Henderson v. United States, 95 F.Supp.2d 995 (E.D.Wis.2000). As the district court noted in Ballhaus , those "holdings rested on congressional intent as construed by the legislative record, which indicated that Congress was well-aware of the case law constraining the federal courts' ability to review the Secretary's decisions, and had intended not to disturb the Argabright line of cases holding that district court review was unavailable." 341 F.Supp.2d at 1148.

On the other hand, the Fifth Circuit concluded in Beall v. United States, 336 F.3d 419 (5th Cir.2003), that district courts did have subject matter jurisdiction to review §6404(e)(1) appeals and that the APA did not bar review of those claims. Accord Leiter v. United States , No. Civ.A. 03-2149-GTV, 2004 WL 303210, at *8 (D.Kan. Jan.22, 2004) ("After reviewing the prior cases deciding this issue, as well as the relevant legislative history, the court is persuaded by the 5th Circuit's rationale in Beall. Accordingly, the court concludes that it has jurisdiction to review the IRS's denial of Plaintiff's request to abate interest.").

According to the Fifth Circuit, the purpose of amending §6404 in 1996 was to remove any impediment to district court review of interest abatement claims, and "Congress clearly expressed its intent that the decision to abate interest no longer rest entirely within the Secretary's discretion." Beall, 336 F.3d at 426, 429. The court reasoned that the fact that the Tax Court had jurisdiction to review interest abatement challenges means that the abatement decision was "no longer committed solely to agency discretion," and thus that the APA did not preclude judicial review of those claims. Id. at 426-27. The court also held that Congress's enactment of §6404(h) did not repeal the

district court's existing subject matter jurisdiction because the legislative history stated that "[n]o inference is intended as to whether under present law any court has jurisdiction to review IRS's failure to abate interest" and repeals by implications are disfavored. Id. (quoting H.R.Rep. No. 104-105, at 28 (1996)).

In addition, the court expressed concern that denying the district court jurisdiction to hear claims under §6404(e)(1) would result in two anomalies: first, only certain taxpayers who met the net worth requirements found in §6404(h) would be able to seek judicial review of the IRS's failure to abate interest, and second, denying district courts power to hear claims under §6404(e)(1) would force certain plaintiffs to split their abatement claims from their refund claims, and force them to seek relief in two courts. Id. at 430. The court thus concluded that the grant of jurisdiction to the Tax Court in §6404(h) over interest abatement claims was not meant to preclude the district courts' exercise of jurisdiction over those same claims. Id.

On appeal, the Hincks argue that the Court of Federal Claims had jurisdiction over their interest abatement claim under both the Tucker Act, 28 U.S.C. §1491,[3] and 28 U.S.C. §1346(a)(1).[4] Because jurisdiction is presumed from the Tucker Act and 28 U.S.C. §1346(a)(1), the Hincks assert that pre-1996 cases dismissing interest abatement claims in the district courts for lack of jurisdiction under the APA

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[3] 28 U.S.C. §1491(a) provides the Court of Federal Claims with jurisdiction over claims "founded either upon the Constitution or any Act of Congress or any regulation of an executive department."

[4] 28 U.S.C. §1346(a)(1) provides the federal district courts, "concurrent" with the Court of Federal Claims, with jurisdiction over "[a]ny civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected ... or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws."

were erroneously decided. The Hincks also assert that even if those cases were correctly decided, their holdings were abrogated by the 1996 Taxpayer Bill of Rights 2, which provided a judicially manageable standard for reviewing §6404(e)(1) claims. In addition, the Hincks argue that the statute does not create an exclusive grant of jurisdiction to the Tax Court, pointing out that the tax system generally grants jurisdiction to the Court of Federal Claims and district courts over post-payment tax refund actions, such as §6404(e)(1) claims. The Hincks contend that Congress would have expressly mandated exclusive jurisdiction in the statute if it had intended to do so; they assert that an interpretation of the statute contrary to their position would frustrate the intent of the Taxpayer Bill of Rights 2 to "provide for increased protections of taxpayer rights."

The government responds that the Court of Federal Claims correctly determined that it derives its jurisdiction over interest abatement claims from the Tucker Act. However, the government asserts that the Court of Federal Claims may not review the IRS's denial of interest abatements because §6404(h) consigns review of the IRS's determinations exclusively to the Tax Court. The government also contends that interest abatement decisions are not reviewable in the Court of Federal Claims because there are no relevant factors or justiciable standards for determining when the IRS must abate interest. Finally, the government argues that because the version of §6404(e)(1) at issue is virtually identical to the original version, the analysis of that provision in pre-1996 cases remains valid.

Our decision turns on the issue of subject matter jurisdiction: whether §6404(h)'s grant of jurisdiction to the Tax Court is exclusive or whether the Court of Federal Claims has concurrent jurisdiction to review interest abatement claims. It is well established that, without subject matter jurisdiction, the Court of Federal Claims, or any court, lacks power to determine the case before it.

United States v. Cotton, 535 U.S. 625, 630, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002). "A party seeking the exercise of jurisdiction in its favor has the burden of establishing that such jurisdiction exists." Rocovich v. United States, 933 F.2d 991, 993 (Fed.Cir.1991). The subject matter jurisdiction of the Court of Federal Claims is limited. *See* 28 U.S.C. §§1491-1509. We are also mindful of "the black letter law that the United States as a sovereign may not be sued unless it consents." Flexfab, L.L.C. v. United States , 424 F.3d 1254, 1263 (Fed.Cir.2005) (citing United States v. Lee, 106 U.S. 196, 1 S.Ct. 240, 27 L.Ed. 171 (1882)). "We thus are careful not to open the courthouse doors to those falling victim to the statements of unauthorized government agents, lest we broaden improperly the government's waiver of immunity from suit in these cases." Id. at 1264 (citing Chancellor Manor v. United States , 331 F.3d 891, 898 (Fed.Cir.2003) ("Waivers of sovereign immunity are construed narrowly.")).

Here, we agree with the government that §6404(h) grants the Tax Court exclusive jurisdiction over interest abatement claims, and that the Court of Federal Claims thus does not have subject matter jurisdiction to review those claims. When interpreting a statute, we look first to the language of the statute. United States v. Wells, 519 U.S. 482, 490, 117 S.Ct. 921, 137 L.Ed.2d 107 (1997). Section 6404(h) grants jurisdiction to a particular court, the Tax Court, to review IRS denials of interest abatements, and also specifies a particular standard, abuse of discretion, to be applied by that court: the "Tax Court shall have jurisdiction ... to determine whether the Secretary's failure to abate interest under this section was an abuse of discretion." Section 6404(h) also grants the Tax Court the power to issue a remedy: "[t]he Tax Court ... may order an abatement, if [an interest abatement] action is brought within 180 days after the date of the mailing of the Secretary's final determination not to abate such interest."

Because §6404(h) provides a specific procedure for reviewing IRS determinations of interest abatement, specifies that the proper forum for those reviews is the Tax Court, and grants the Tax Court the power to issue an abatement, we conclude that Congress intended the Tax Court to be the sole forum in which denials of interest abatement claims may be challenged.

Our view is confirmed by Supreme Court decisions holding that where "Congress has provided statutory review procedures designed to permit agency expertise to be brought to bear on particular problems, those procedures are presumed to be exclusive." Whitney Nat'l Bank in Jefferson Parish v. Bank of New Orleans & Trust Co., 379 U.S. 411, 420, 85 S.Ct. 551, 13 L.Ed.2d 386 (1965) (citing Callanan Road Improvement Co. v. United States, 345 U.S. 507, 73 S.Ct. 803, 97 L.Ed. 1206 (1953); Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 58 S.Ct. 459, 82 L.Ed. 638 (1938); Texas & Pac. R. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 27 S.Ct. 350, 51 L.Ed. 553 (1907)).

In Whitney National Bank, the statute at issue was the Bank Holding Company Act of 1956, which prohibited a bank holding company from acquiring ownership or control of a national bank, new or existing, without the approval of the Federal Reserve Board. The Act provided for a full administrative proceeding before the Board in which all interested persons could participate and the views of the interested supervisory authorities could be obtained, and judicial review of that proceeding by specific courts of appeals. Id. at 417, 85 S.Ct. 551. The Supreme Court held that the statutory review procedures found in the Bank Holding Company Act of 1956 were "the sole means by which questions as to the organization or operation of a new bank by a bank holding company may be tested." Id. at 419, 85 S.Ct. 551. The Court reasoned,

> Congress has set out in the Bank Holding Company Act of 1956 a carefully planned and comprehensive method for challenging Board determinations. That action by Congress was designed to permit an agency, expert in banking matters, to explore and pass on the ramifications of a proposed bank holding company arrangement. To permit a district court to make the initial determination of a plan's propriety would substantially decrease the effectiveness of the statutory design.

Id. at 420, 85 S.Ct. 551.

The same reasoning applies here. Even though the Tax Court is not an agency, it is a specialized court with expertise in tax matters. Congress only expressed its intent in §6404(h) that the Tax Court review the merits of interest abatement claims and order remedies as appropriate. In this context, permitting the Court of Federal Claims to make a concurrent determination as to the propriety of a denial of interest abatement "would substantially decrease the effectiveness of the statutory design." Id.

Further, the legislative history confirms that Congress intended the Tax Court to have exclusive subject matter jurisdiction over abatement decisions under §6404(e)(1). The House Report accompanying the Taxpayer Bill of Rights 2 states:

> Present law
>
> Federal courts generally do not have the jurisdiction to review the IRS's failure to abate interest.
>
> Reasons for change
>
> The Committee believes that it is appropriate for the Tax Court to have jurisdiction to abate interest with respect to certain taxpayers.

Explanation of provision

> The bill grants the Tax Court jurisdiction to determine whether the IRS's failure to abate interest for an eligible taxpayer was an abuse of discretion. The Tax Court may order an abatement of interest. The action must be brought within 180 days after the date of mailing of the Secretary's final determination not to abate interest. An eligible taxpayer must meet the net worth and size requirements imposed with respect to awards of attorney's fees. No inference is intended as to whether under present law any court has jurisdiction to review IRS's failure to abate interest.

H.R.Rep. No. 104-506, at 28 (1996). Clearly, in 1996, Congress recognized that the courts generally do not have jurisdiction over interest abatement claims. However, Congress did not then grant jurisdiction to district courts and the Court of Federal Claims. Rather, the language of §6404 vests jurisdiction specifically in the Tax Court. As a House Report accompanying the pending Taxpayer Bill of Rights 2000 states:

> The Taxpayer Bill of Rights 2 specifically granted jurisdiction to the Tax Court to review for abuse of discretion any decision by the IRS not to abate interest that is attributable to unreasonable error or delay be Service employees in the performance of a ministerial or managerial act, effective for requests for abatement filed after July 30, 1996. Otherwise review of the Secretary's failure to use his or her discretion may not be available. The courts have held that judicial review of the IRS' failure to use its discretion to abate interest is generally not available, unless jurisdiction is specifically granted by statute or a standard has been established.

H.R.Rep. No. 106-566, at 32 (2000) (emphasis added) (footnotes omitted). Based on the specific statutory mandate, we therefore conclude that Congress intended to grant the Tax Court exclusive jurisdiction over interest abatement claims, and thus withdrew subject matter jurisdiction from all other courts over those claims.

Our interpretation of §6404(h) is consistent with various district court decisions that have also concluded that the Tax Court has exclusive subject matter jurisdiction over the IRS's denials of interest abatement. Ballhaus, 341 F.Supp.2d at 1151 ("[T]his Court determines that it does not have subject matter jurisdiction to hear the Plaintiff's claim for abatement of the interest assessed against him by the IRS. The 1996 amendment's express grant of jurisdiction to the tax court to hear disputes regarding interest abatements created exclusive jurisdiction in the tax court at the fact-finding stage of litigation.")Kraemer, 2002 WL 575791, at *6 ("Congress first acknowledged the district courts' powerlessness to review abatement decisions and then granted the Tax Court, alone, that jurisdictional power. This is the only plausible reading of 26 U.S.C. §6404[h]."); Dogwood Forest Rest Home, Inc., 181 F.Supp.2d at 558 ("[T]he review of the IRS's determination not to abate interest is properly within the jurisdiction of the Tax Court and not within the subject matter jurisdiction of this court."); Davies, 124 F.Supp.2d at 720 ("Congress, in enacting section [6404(h)], was well aware of, and intended to leave undisturbed, the Argabright line of cases-i.e ., that it expected that federal district courts would not undertake [review of interest abatement claims]."); Henderson, 95 F.Supp.2d at 1004 (E.D.Wis.2000) ("[T]his Court lacks jurisdiction over plaintiffs' request for interest abatement under section 6404(e) as section 6404(i) [which became 6404(h)] grants jurisdiction specifically to the Tax Court.").

Finally, as we have noted, the Fifth Circuit has rendered a contrary decision in Beall, holding that "in enacting section 6404(h), Congress ... removed any impediment to district court review of section 6404(e)(1) claims." 336 F.3d at 428. According to the Fifth Circuit, finding exclusive jurisdiction in the Tax Court would result in two anomalies: first, only certain taxpayers who meet the net worth requirements found in §6404(h) would be able to seek judicial review of the IRS's failure to abate interest, and second, denying district courts power to hear claims under §6404(e)(1) would force certain plaintiffs to split their abatement claims from their refund claims, and force them to seek relief in two courts. Id. at 430. Respectfully, neither concern persuades us to construe differently a statute that is clear on its face.

First, the legislative history makes clear that Congress was aware that only certain taxpayers could seek relief under §6404(h). See H.R.Rep. No. 104-506 at 28 (1996) ("The Committee believes it is appropriate for the Tax Court to have jurisdiction to review IRS's failure to abate interest with respect to certain taxpayers .") (emphasis added). To the extent that the statute provides no recourse for taxpayers who exceed the net worth criteria in §7430, that result was contemplated by Congress. We cannot rewrite the statute to reach a different outcome. Allowing individuals who exceed the net worth requirement of §7430 to bring a refund suit in other courts would undermine Congress's clear intent to limit the right to recover to those satisfying a net worth limitation. We note that in the Equal Access to Justice Act, 28 U.S.C. §2412(d), Congress provided that recovery of attorney fees incurred in litigating against the government is limited to parties "whose net worth did not exceed $2,000,000 at the time the civil action was filed." A similar limitation was imposed here.

Second, Congress recognized that district courts had jurisdiction over tax refund claims, but not interest

abatement claims, and specifically granted the Tax Court jurisdiction over the latter in particular circumstances involving certain taxpayers. That the interest abatement claim may have to be separated from a refund claim may not appear to be efficient, but that policy concern does not compel a different statutory construction when the statute seems clear.

Based on the language and legislative history of the statute, we thus conclude that §6404(h) grants exclusive subject matter jurisdiction to the Tax Court to review the IRS's denials of interest abatement. Because the Court of Federal Claims lacked subject matter jurisdiction over the Hincks' interest abatement claim, we do not address justiciability. In addition, we have considered the Hincks' remaining arguments and find them unpersuasive or unnecessary for our decision.

CONCLUSION

Because the Court of Federal Claims lacked subject matter jurisdiction over the Hincks' interest abatement claim, the decision of that court is

AFFIRMED.

Revised July 14, 2003

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 01-41471

RAYMOND W. BEALL; HAZEL A. BEALL,

Plaintiffs-Appellants,

versus

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court

for the Eastern District of Texas.

Before GARWOOD, JONES and STEWART, Circuit Judges.

GARWOOD, Circuit Judge:

Plaintiffs-appellants Raymond W. Beall and Hazel A. Beall (the Bealls) appeal the dismissal, for want of subject matter jurisdiction, of their claim for a refund of the interest on income taxes paid to the defendant-appellee, the United States. Because we conclude, for the reasons set forth below, that the district court did possess jurisdiction to hear the Bealls' complaint, we reverse the judgment of the district court and remand.

Background

On March 31, 1997, the Bealls entered into a settlement agreement with the Internal Revenue Service (IRS) to resolve certain tax deficiencies arising from the Bealls' 1984 tax return and subsequent claim for refund. [1] Following that settlement, the IRS assessed additional income taxes, as well as interest on those taxes, against the Bealls. After satisfying their outstanding tax liability, the Bealls, on December 22, 1997, filed a claim for refund of the tax and interest charged against them.

The IRS denied the Bealls' claim for refund, and on April 22, 1999, the Bealls filed a supplemental claim for refund in which they claimed both that the interest on their assessed tax liability should have been netted against other years under 26 U.S.C. §6221(d), and that a portion of that interest should have been abated under 26 U.S.C. §6404(e)(1). Based on those refund claims, the Bealls then commenced the present suit in federal district court on March 28, 2000.

The district court granted the Government's motion to dismiss, concluding, among other things, that it lacked subject matter jurisdiction to hear a challenge to the denial of a request for interest abatement under section 6404(e)(1)

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[1] The Bealls' tax dispute with the IRS centered around Raymond Beall's investment, in the early 1980s, in two agricultural partnerships. Based on losses reported by those partnerships, the Bealls claimed a tax loss for 1984 of $208,353, and filed an application for a tax refund in 1985 on which they carried back a portion of losses incurred by the partnerships from 1981 to 1984. The IRS eventually examined the partnerships' 1984 returns, and in 1991, issued proposed adjustments to the partnerships' income tax returns. It is the Bealls' income-tax liability resulting from those adjustments that formed the basis of the present dispute.

of the Internal Revenue Code.[2] The Bealls now appeal the dismissal only of that part of their claim for refund based on 26 U.S.C. §6404(e)(1).

Discussion

"We review a district court's grant of a motion to dismiss for lack of subject-matter jurisdiction *de novo,* using the same standards as those employed by the lower court." *John Corp. v. City of Houston,* 214 F.3d 573, 576 (5th Cir.2000); *Rodriguez v. Texas Comm'n on the Arts,* 199 F.3d 279, 280 (5th Cir.2000). We accept as true the Bealls' uncontroverted factual allegations, "and will affirm the dismissal if 'the court lacks the statutory or constitutional power to adjudicate the case.' " *Id.* (quoting *Nowak v. Ironworkers Local 6 Pension Fund,* 81 F.3d 1182, 1187 (2d Cir.1996)).

A. *Sovereign Immunity*

As a threshold matter, we first address the Government's position that Congress has not waived sovereign immunity so as to permit a plaintiff to sue in federal district court for a refund of unabated interest. *See F.D.I.C. v. Meyer,* 114 S.Ct. 996, 1000 (1994) ("Sovereign immunity is jurisdictional in nature.... Therefore, we must first decide whether ... immunity has been waived."). Without such a waiver, there can be no jurisdiction over the Bealls' refund claim in either the district court or in this court. *Id.; United States v. Mottaz,* 106 S.Ct. 2224, 2229 (1986) ("When the United States consents to be sued, the terms of its waiver of sovereign immunity define the extent

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[2] The district court also dismissed, for want of subject matter jurisdiction, the Bealls §6221(d) interest-netting claim. The court had previously dismissed, as untimely, that portion of the Bealls' complaint that relied on their December 12, 1997, claim for a refund. The Bealls did not appeal either of these rulings, and they are not, therefore, now before us.

of the court's jurisdiction."); *Moore v. Dept. of Agric. on Behalf of Farmers Home Admin.*, 55 F.3d 991, 993 (5th Cir.1995).

The Bealls premised subject matter jurisdiction in the district court upon 28 U.S.C. §1346. Section 1346(a)(1) provides for original jurisdiction in the district courts over claims "for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws." 28 U.S.C. §1346. We have stated, however, that section 1346, standing alone, is insufficient to waive sovereign immunity. "Section 1346 is a general jurisdiction statute that does not constitute a separate waiver of sovereign immunity." *Shanbaum v. United States*, 32 F.3d 180, 182 (5th Cir.1994).

The Bealls' complaint, however, references, among other provisions, section 7422 of the Internal Revenue Code. In language that mirrors section 1346, section 7422 provides for a civil action for refund of certain wrongfully collected taxes.[3] And although section 1346 does not waive sovereign immunity by itself, when coupled with a claim brought under section 7422, section 1346 does provide the necessary waiver of immunity. *See United States v. Michel*, 51 S.Ct.

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[3] Section 7422 provides for the recovery of "any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected." 26 U.S.C. §7422(a).

Section 7422's reference to "any internal revenue tax" also encompasses interest assessed on an owed tax. *See* 26 U.S.C. §6601(e)(1) (providing that "[a]ny reference" in the Internal Revenue Code "to any tax imposed by this title shall be deemed also to refer to interest imposed by this section on such tax").

284, 285 (1931); *Shanbaum,* 32 F.3d at 182 ("Section 1346 operates in conjunction with 26 U.S.C. §7422 to provide a waiver of sovereign immunity in tax refund suits ... when the taxpayer has fully paid the tax and filed an administrative claim for a refund.").

The Bealls have fully paid the tax and interest at issue, and have filed a claim for a refund with the IRS. If their claim for a refund of unabated interest under 26 U.S.C. §6404(e)(1), therefore, is cognizable under section 7422, then sovereign immunity presents no bar to the exercise of subject matter jurisdiction.

The Government's claim of immunity thus requires us to address the compass of section 7422 with an eye to determining whether it can accommodate the Bealls' interest abatement claim. According to the Government it cannot, and a claim for abatement of interest, therefore, cannot be brought as a claim for a refund under section 7422. The language of the statute, however, is not susceptible to so limited a construction, and we decline to give it such.

Section 7422 permits a claim for a refund not only for "erroneously or illegally assessed" taxes, but also for "any sum alleged to have been excessive or in any manner wrongfully collected." 26 U.S.C. §7422. Whether the Bealls' abatement claim is cognizable under section 7422, thus requires the resolution of two questions: (1) whether the phrase "any sum," includes unabated interest charged on income taxes owed; and if so, (2) whether the phrase "excessive or ... wrongfully collected" includes a sum of interest that the IRS has refused to abate in accordance with 26 U.S.C. §6404.[4] [FN4] We answer both questions in

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[4] Section 6404, as amended by the Taxpayer Bill of Rights II, *see* Pub. L. No. 104-168, §301(a), 110 Stat. 1452 (1996), permits the Secretary of the Treasury to abate interest charged against a taxpayer, and provides

the affirmative, and conclude, therefore, that a claim for a refund of unabated interest is cognizable under section 7422 and is not barred by sovereign immunity.

The Supreme Court has long since indicated that the phrase "any sum" likely encompasses a claim for interest. Thus in construing identical language in section 1346, the Court noted that " 'any sum,' instead of being related to 'any internal-revenue tax' and 'any penalty,' may refer to amounts which are neither taxes nor penalties," and that "[o]ne obvious example of such a 'sum' is interest." *See Flora v. United States,* 80 S.Ct. 630, 633 (1960).

A claim for abatement of interest, however, differs from the prototypical claim for refund of taxes and interest under section 7422. The archetypal refund claim is a claim that the taxpayer never owed the underlying tax. *See United States v. Williams,* 115 S.Ct. 1611, 1616 (1995) (noting that section 1346(a)(1) displaced the common-law remedy of assumpsit for money had and received, a remedy that afforded relief to taxpayers who "had paid money they did not owe–typically as a result of fraud, duress, or mistake"); *see, e.g., Your Insurance Needs Agency, Inc. v. United States,* 274 F.3d 1001 (5th Cir.2001) (addressing a refund claim for tax overpayments). A claim for the refund of interest that the taxpayer argues should have been abated, on the other

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in relevant part

> "(e) Abatement of interest attributable to unreasonable errors and delays by Internal Revenue Service.–
>
> (1) In general.–In the case of any assessment of interest on–
>
> (A) any deficiency attributable in whole or in part to any unreasonable error or delay by an officer or employee of the Internal Revenue Service (acting in his official city) in performing a ministerial or managerial act, or ... The Secretary may abate the assessment of all or any part of such interest for any period." 26 U.S.C. §6404(e)(1) (2002).

hand, is not a claim to recover money that was paid but never owed, but is a claim that interest, otherwise legitimately assessed, could have been less had the IRS not unreasonably delayed in the performance of a ministerial or managerial task. *See* 26 U.S.C. §6404(e)(1).

That a claim for abatement of interest is not identical to an action in assumpsit or a refund claim challenging the validity of the underlying tax, however, does not necessarily establish that an abatement claim cannot be prosecuted under section 7422. Section 7422 is a statutory remedy, and is not confined to the limits of its common-law ancestor. *See, e.g., Flora,* 80 S.Ct. at 635 (noting that since 1862, an action for refund ceased to be regarded as a common-law action, "but rather as a statutory remedy which 'in its nature [was] a remedy against the Government' ") (quoting *Curtis's Adm'x v. Fiedler,* 67 U.S. (2 Black) 461, 479 (1862)). It is the language of section 7422 that must control, language that in referring broadly to "any sum," would by its terms appear to accommodate a claim for the abatement of interest.

Finally, we note that our decision in *Poretto v. Usry,* 295 F.2d 499 (5th Cir.1961), supports the conclusion that section 7422 may accommodate a claim for the refund of unabated interest. In *Poretto,* a taxpayer who had been penalized for failing to withhold excise taxes on behalf of his customers, brought an action, citing section 6404, for the abatement of assessed taxes and penalties. *Id.* at 499. Although we affirmed the dismissal of the taxpayer's action for equitable relief, we noted that the taxpayer's appropriate course of action would have been to pay the taxes and penalties, and then to challenge the tax through the normal "pay and sue" provisions of section 7422. *Id.* at 501-02. We read *Poretto,* therefore, as supporting the proposition that a cause of action under section 7422 encompasses a claim for abatement of interest under section 6404(e)(1). *See also Magnone v. United States,* 733

F.Supp. 613 (S.D.N.Y.1989) (indicating that a claim under 6404(e)(1) could have proceeded as a claim for a refund under section 7422, had the plaintiffs complied with the payment requirements of that section). Accordingly, we decline to restrict section 7422 as the Government suggests, and instead find that the phrase "any sum," thus unmoored from its common-law origins, is copious enough to encompass a claim for refund of unabated interest.

Having answered the first question–whether the phrase "any sum" includes unabated interest charged on income taxes owed–in the affirmative, we now turn to the second, and conclude that the phrase "excessive or ... wrongfully collected" includes interest charges that the IRS abused its discretion in refusing to abate pursuant to 26 U.S.C. §6404(e)(1).

As we did above, in interpreting a statute, we look first to its plain language. *See Moore v. Cain,* 298 F.3d 361, 366 (5th Cir.2002). Excessive is defined as "exceeding the usual, *proper,* or normal." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 792 (1961) (emphasis added). *See also* 5 OXFORD ENGLISH DICTIONARY 501 (2d ed. 1999) ("Exceeding what is right, proportionate, or desirable; immoderate, inordinate, extravagant."). [5] The question thus becomes whether the denial of a request for abatement of interest, where that denial amounts to an abuse of discretion, is either not proper, or results in the collection of a sum of interest that so exceeds the usual or normal as to be considered excessive.

An abuse of discretion necessarily occurs where an act can only be described as clearly improper. *See, e.g., United*

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[5] The Supreme Court has applied an identical definition of the term "excessive" in the context of the Excessive Fines Clause. *See United States v. Bajakajian,* 118 S.Ct. 2028, 2036-2037 (1998) ("Excessive means surpassing the usual, the proper, or a normal measure of proportion.").

States v. O'Neil, 709 F.2d 361, 372 n. 11 (5th Cir.1983) (equating an improper decision with an abuse of discretion). Thus, where a refusal to abate interest amounts to an abuse of discretion, we may conclude that that refusal is improper, and the improperly unabated interest therefore excessive. In other words, any time that the Secretary should commit an abuse of discretion in denying a request for an abatement, the Secretary has assessed an improper, and therefore an excessive sum. Thus we also answer in the affirmative our second question–whether the phrase "excessive or ... wrongfully collected" includes a sum of interest that the IRS has improperly refused to abate in accordance with 26 U.S.C. §6404.

Having determined that the phrase "any sum" includes a sum of unabated interest, and that the phrase "excessive ... or wrongfully collected" includes the denial of a request for abatement where that denial amounts to an abuse of discretion, we conclude that an interest abatement claim is cognizable under section 7422, and that sovereign immunity over such claim is waived by operation of sections 7422 and 1346. We therefore join our sister circuits in holding that a "taxpayer['s] cause of action, alleging that [he] paid excessive interest charges because the IRS abused its discretion in refusing to abate interest pursuant to I.R.C. §6404(e)(1), falls within the district court's jurisdiction to decide cases regarding 'any sum alleged to have been excessive ... under the internal-revenue laws.' " *Selman v. United States,* 941 F.2d 1060, 1062 (10th Cir.1991); *accord Argabright v. United States,* 35 F.3d 472 (9th Cir.1994) (declining to review an interest abatement claim, but exercising subject matter jurisdiction over that claim); *Horton Homes, Inc. v. United States,* 936 F.2d 548, 550 (11th Cir.1991) (same).

B. *Review of Section 6404(e)(1) Denials*

That the district court possessed the power to hear the Bealls' claim, however, merely begins our inquiry; it does not establish whether the denial of the Bealls' request for abatement of interest is subject to judicial review.

Under the Administrative Procedure Act (APA), final agency decisions are generally susceptible to judicial review. Section 701(a) of the APA, however, proscribes review in two narrow situations, namely where "(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. §701(a)(1), (2). Based on these limitations, each circuit to address the issue prior to 1996 determined that the decision to grant an abatement under section 6404(e)(1) was not subject to judicial review. *See Argabright,* 35 F.3d at 476; *Selman,* 941 F.2d at 1064; *Horton Homes,* 936 F.2d at 554.

Proceeding from section 701 of the APA, those circuits concluded that the permissive language of section 6404(e)(1), as well as the absence in that section of any substantive standards by which a court might review an agency action, precluded judicial review. *See Argabright,* 35 F.3d at 475-476 (citing *Horton Homes* and *Selman*). In further support of this position, each circuit also examined the legislative history of section 6404, noting the absence of any substantive standards for review in the legislative history, as well as language in the House and Senate reports noting that section 6404(e)(1) "gives the IRS the authority to abate interest but does not mandate that it do so." *Id.* at 476. Accordingly, all three ultimately agreed that "the language, structure and legislative history of I.R.C. §6404(e)(1) indicate[d] that Congress meant to commit the abatement of interest to the Secretary's discretion," and

that section 701(a)(2) barred judicial review. *Selman,* 941 F.2d at 1064.[6]

Congress, however, has since amended section 6404. As part of the passage in 1996 of the Taxpayer Bill of Rights II, *see* Pub. L. No. 104-168, 110 Stat. 1452 (codified as amended in scattered sections of 26 U.S.C.), Congress approved a number of amendments to section 6404 that are relevant to our analysis of the present case. First, with respect to section 6404(e)(1), Congress added "unreasonable" to modify the words "error or delay," and added "or managerial act," where before only "ministerial act" had appeared. *See id.* at §301(a)(2). The current version of section 6404(e)(1), therefore, now provides:

> "(e) Abatement of interest attributable to unreasonable errors and delays by Internal Revenue Service.–
>
> (1) In general.–In the case of any assessment of interest on–
>
> > (A) any deficiency attributable in whole or in part to any unreasonable error or delay by an officer or employee of the Internal Revenue Service (acting in his official capacity) in performing a ministerial or managerial act, ...
>
> The Secretary may abate the assessment of all or any part of such interest for any period." 26 U.S.C. §6404(e)(1) (2002).

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[6] Of the three opinions, only one, *Horton Homes,* concluded that review of the abatement decision was prohibited by §701(a)(1) as well as §701(a)(2). *See Horton Homes,* 936 F.2d at 551-552. The *Selman* court found that the language of §6404(e)(1) did not expressly preclude judicial review, *see Selman,* 941 F.2d at 1063, and the *Argabright* court, having found review precluded by §701(a)(2), did not address the applicability of §701(a)(1).

Second, Congress provided for review in the Tax Court of the Secretary's decision to deny a request for the abatement of interest. *See* Pub. L. No. 104-168, §302, 110 Stat. 1457-1458 (1996). Thus, the current section 6404(h)[7] provides, in part, that

> "The Tax Court shall have jurisdiction over any action brought by a taxpayer who meets the requirements referred to in section 7430(c)(4)(A)(ii) to determine whether the Secretary's failure to abate interest under this section was an abuse of discretion, and may order an abatement, if such action is brought within 180 days after the date of the mailing of the Secretary's final determination not to abate such interest." 26 U.S.C. §6404(h).

The statutory landscape in which we address the Bealls' claim for interest abatement is thus substantially different from the one facing the *Horton Homes, Selman* , and *Argabright* courts. And though, were we to address today the same issue that faced those courts, we would most likely, and for the same reasons, conclude that judicial review of the Secretary's decision to deny an abatement request is barred, our decision now must be guided instead by the above 1996 amendments.[8] We cannot merely adopt

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[7] Section 6404(h) has not been substantively amended since its passage in 1996. Its designation, however, has changed twice. The current §6404(h) was initially designated §6404(g). It was redesignated 6404(i) by the IRS Restructuring and Reform Act of 1998. Thus, from 1998 until 2002, it appeared in the United States Code as 26 U.S.C. §6404(i). In 2002, Public Law Number 107-134, §112(d)(1) repealed the former subsection (h) and designated then subsection 6404(i) as subsection (h), the designation it currently holds.

[8] The Bealls attack, in a number of places in their brief, the soundness of the decisions in *Horton Homes*, *Selman*, and *Argabright* that the denial of a request for abatement before 1996 was, in fact, wholly discretionary and unreviewable. This question, however, is now not before us.

the reasoning of the *Horton Homes* line of cases, but must construe, as a matter of first impression, the effect of the 1996 changes to section 6404.

Having reviewed those changes, we find that in amending section 6404, Congress clearly expressed its intent that the decision to abate interest no longer rest entirely within the Secretary's discretion. *See Miller v. Commissioner of Internal Revenue,* 310 F.3d 640, 643 (9th Cir.2002) (recognizing that " *Argabright* 's holding that judicial review is not available for IRS decisions pursuant to §6404(e)(1) ... has been undermined by subsequent legislation and, to that extent, is no longer good law."). We need look no further for support for this conclusion than the simple addition of section 6404(h) granting jurisdiction to the Tax Court to review that decision. Indeed, the vesting of jurisdiction in the Tax Court to review interest abatement challenges can be given no meaning other than that the abatement decision is no longer committed solely to agency discretion. Accordingly, we cannot say that either section 701(a)(2) of the APA, or the absence of manageable standards of review generally, any longer precludes judicial

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Moreover, that issue apparently was resolved contrary to the Bealls' position by our unpublished opinion in *Maloney v. United States,* 95-2 U.S.T.C. ¶50,441 (No. 94-30609, 5th Cir. July 13, 1995), in which we affirmed without statement of reasons the district court's unpublished decision in *Maloney v. United States,* 94-2 U.S.T.C. ¶ 50,484 (civil No. 94-0602, E.D.La. Sept. 6, 1994). Although our opinion there does not so reflect, the district court's opinion in *Maloney* relied on *Horton Homes* and *Selman* and held "the Court is without authority to review plaintiff's claim that the IRS should have abated the assessment of interest under 26 U.S.C. §6404(e)(1)." Unpublished opinions issued before January 1, 1996, are precedent. Fifth Cir. Rule 47.5.3.

review of the denial of a request for the abatement of interest.[9]

C. *Exclusive Jurisdiction in the Tax Court*

Having concluded that the decision to abate interest no longer rests entirely with the Secretary, the question remains whether review of that decision is limited to the Tax Court, or whether review is also available in federal district court. Thus, although both parties concede, as they must, that review of the Secretary's decision is now available in the Tax Court, the Government maintains that the grant of jurisdiction in section 6404(h) to the Tax Court is exclusive, and that the district court is, therefore, without power to hear a claim under section 6404(e)(1). We do not agree.

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[9] Although we hold that Congress has indicated that the decision to abate interest is no longer committed entirely to agency discretion, and that judicial review of that decision is no longer barred by §701(a)(2) of the APA, because we also hold that a claim for a refund of unabated interest is cognizable under I.R.C. §7422, *see supra* Part II(A), we note that our discussion of §701(a)(2) should not be read as sanctioning the use of the APA as a vehicle for bringing a challenge to a decision of the Secretary under §6404(e)(1). "Congress did not intend the general grant of review in the APA to duplicate existing procedures for review of agency action." *Bowen v. Massachusetts,* 108 S.Ct. 2722, 2736 (1988). And review under the APA is accordingly available only where "there is no other adequate remedy in a court." 5 U.S.C. §704; *see Poirier v. Commissioner,* 299 F.Supp. 465, 466 (E.D.La.1969) (denying relief under the APA where taxpayers had an adequate remedy under the I.R.C.); *see also Town of Sanford v. United States,* 140 F.3d 20, 23-24 (1st Cir.1998) (denying relief under the APA for the recovery of taxes lost when the United States obtained a forfeiture judgment against a local taxpayer where the plaintiff town had the available remedy of moving to reopen a forfeiture decree); *New York City Employees' Ret. Sys. v. Securities and Exchange Commission,* 45 F.3d 7, 14 (1995) (refusing to entertain a claim for relief under the APA where the plaintiffs had an available alternative remedy under Rule 14a-8).

Unlike our conclusion that the Secretary's abatement decision is no longer discretionary, determining whether Congress intended for the jurisdictional grant in section 6404(h) to be exclusive requires us to delve further into the legislative history of section 6404 than merely noting the simple fact of section 6404(h)'s enactment.

The House report accompanying the 1996 Taxpayer Bill of Rights indicates that Congress was aware of the *Horton Homes* line of cases. In describing the pre-1996 state of the law governing the review of interest abatement denials, the report notes that "[f]ederal courts generally do not have the jurisdiction to review the IRS's failure to abate interest." *See* H.R. REP. NO. 104-506, at 28 (1996). From this statement, the Government argues that because Congress was aware that federal courts would not review the Secretary's decision under section 6404(e)(1), the decision to grant jurisdiction only to the Tax Court must mean that Congress chose not to extend jurisdiction to the district courts.[10]

There are, however, a number of problems with the Government's argument. First, it ignores the basis for the decisions in the *Horton Homes* line of cases. Those decisions denied review not because the district courts lacked subject

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[10] The Government is not alone in advancing this position. Rather, at least three district courts, in addition to the court below, have been persuaded by identical reasoning. *See Kraemer v. United States*, 89 A.F.T.R.2d 2002-1796 (S.D.Tex.2002) ("Congress first acknowledged the district courts' powerlessness to review abatement decisions and then granted the Tax Court, alone, that jurisdictional power. This is the only plausible reading of 26 U.S.C. §6404[h]."); *Davies v. United States*, 124 F.Supp.2d 717, 720 (D.Me.2000) ("Congress, in enacting section [6404(h)], was well aware of, and intended to leave undisturbed, the *Argabright* line of cases–*i.e.*, that it expected that federal district courts would not undertake [review of interest abatement claims]."); *Henderson v. United States*, 95 F.Supp.2d 995 (E.D.Wis.2000).

matter jurisdiction over the taxpayers' claims,[11] but because the then extant version of section 6404(e)(1) committed the decision to abate interest to agency discretion. *See Argabright,* 35 F.3d at 476; *Selman,* 941 F.2d at 1064; *Horton Homes,* 936 F.2d at 554. In other words, the federal district courts have always possessed *jurisdiction* over challenges brought to section 6404(e)(1) denials, they simply determined that the taxpayers had no *substantive right* whatever to a favorable exercise of the Secretary's discretion (at least absent unfavorable exercise on an unconstitutional basis, *Horton Homes* at 554). As we concluded above, however, in amending section 6404(e)(1) and in enacting section 6404(h), Congress indicated that such is no longer the case, and thereby removed any impediment to district court review of section 6404(e)(1) claims.

Not only did Congress remove the barrier to district court review recognized in the *Horton Homes* cases,[12] but Congress nowhere stated in the 1996 amendments that the district courts *did not* have jurisdiction to review interest abatement denials. On the contrary, the House committee report clearly states that "[n]o inference is intended as to

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[11] The Government's entire jurisdictional argument on this point, therefore, is constructed on a false premise, namely that the *Horton Homes, Selman,* and *Argabright* courts did not have subject matter jurisdiction over interest abatement claims. In so doing, the Government merely compounds the committee report's misuse of the term "jurisdiction." *See, e.g., Steel Co. v. Citizens for a Better Environment,* 118 S.Ct. 1003, 1010 (1998) (" 'Jurisdiction,' it has been observed, 'is a word of many, too many, meanings.' ") (quoting *United States v. Vanness,* 85 F.3d 661, 663 n. 2 (D.C.Cir.1996)).

[12] There can be no question but that the IRS's denial of a request for the abatement of interest is now reviewable. *See Taylor v. Commissioner,* 113 TC 206, 1999 WL 717825 (1999) (reviewing the denial of a request for an abatement); *Lee v. Commissioner,* 113 TC 145, 1999 WL 680250 (1999) (same). *See also Miller,* 310 F.3d at 643.

whether under present law any court has jurisdiction to review IRS's failure to abate interest." *See* H.R. REP. NO. 104-506, at 28 (1996).[13]

Viewed against a proper reading of the *Horton Homes* cases, therefore, the Government's argument essentially becomes a claim that Congress, in granting jurisdiction to the Tax Court to review interest abatement denials, impliedly repealed the district court's existing jurisdiction to review the same. Repeals by implication, however, are disfavored. *See Traynor v. Turnage,* 108 S.Ct. 1372, 1381 (1988); *Jackson v. Stinnett,* 102 F.3d 132, 135 (5th Cir.1996) ("It is hornbook law that 'repeals by implication are not favored.' ") (quoting *Crawford Fitting Co. v. J.T. Gibbons, Inc.,* 107 S.Ct. 2494, 2497 (1987)). And there is nothing in the grant of jurisdiction to the Tax Court in section 6404(h) that would preclude review in federal district court. Moreover, as observed above, the House report clearly noted that Congress's grant of jurisdiction was not to be read as a statement regarding the existence *vel non* of jurisdiction in the district courts. [14] Indeed, rather than reading

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[13] The Government would have us read this language as an expression of Congress's intent to leave pre-1996 case law in effect. The more natural reading of the committee's statement, however, takes it simply at face value: that Congress intended to make no statement regarding the existence of jurisdiction in the district courts or the applicability under the new law of the *Horton Homes* line of cases. Moreover, if Congress did intend to leave pre-1996 case law in effect, such a reading would not advance, but would actually undermine the Government's position, *i.e.,* it would follow from the fact that the district courts did have *jurisdiction* over §6404 claims before 1996, that the district courts would continue to have jurisdiction over those claims after 1996.

[14] We realize that our conclusion that the Taxpayer Bill of Rights II was not intended to preclude the exercise of district court jurisdiction to hear abatement claims is undermined somewhat by certain material reprinted in the Congressional Record at the request of Senator Bryan, a co-sponsor of the bill in the Senate that ultimately became the Taxpayer Bill of

the grant of jurisdiction to the Tax Court as implying the absence of jurisdiction in the district court, the more natural interpretation of section 6404(h) is that Congress

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Rights II. That material includes the following explanation of §6404(h):

> "[Taxpayer Bill of Rights II] will provide that for qualified small taxpayers, as defined in section 7430(c)(4)(A)(ii), the Secretary must abate or refund interest when the IRS has made an unreasonable error or delay. This will allow courts to review the IRS determination on the abatement of interest issue for small taxpayers. For nonqualified 'larger' taxpayers, courts will still not be allowed to review the IRS determination on the interest abatement issue...." 141 CONG. REC. S1370-1371 (1995) (material appended to statement of Sen. Bryan).

This isolated statement, however, does not alter our conclusion that the 1996 amendments to §6404 do not deprive the district courts of jurisdiction to hear challenges to the IRS's failure to abate interest. First, Senator Bryan's statement is contradicted by remarks made on the same day by a fellow co-sponsor of the bill in the Senate. In the same portion of the Congressional Record, Senator Pryor noted that the Taxpayer Bill of Rights II will both "require the IRS to abate interest when it has made an unreasonable error or delay, and enable the *courts* the power to review the interest abatement determination." 141 CONG. REC. S1369 (1995) (statement of Sen. Pryor)(emphasis added). Second, the House report, *see supra* text accompanying note 14, which unlike Senator Bryan's 1995 statement was prepared in 1996 at the time the bill was enacted into law, expressly declined to make any statement regarding the availability of review of the abatement issue in the district court. *See* H.R. REP. NO. -506, at 28 (1996) (warning that "[n]o inference is intended as to whether under present law any court has jurisdiction to review IRS's failure to abate interest."). And third, and most important, the language of §6404(h) nowhere indicates that district court review of the abatement issue is not available, nor is there any indication that the grant of jurisdiction to the Tax Court is in any way inconsistent with the availability of district court review.

simply chose to extend concurrent jurisdiction to the Tax Court over a certain class of claims.[15]

We also find persuasive the Bealls' argument that reading the grant of jurisdiction to the Tax Court as exclusive of jurisdiction in the federal district courts, would be inconsistent with the general structure of the Internal Revenue Code and the jurisdictional limitations of the Tax Court.

Though the federal district courts have jurisdiction generally over suits for the refund of taxes, *see* 28 U.S.C. §1346, that jurisdiction is available only where the taxpayer first pays the entire amount of the disputed tax. *See Flora v. United States,* 80 S.Ct. 630, 646-647 (1960). The Board of Tax Appeals, the predecessor of the Tax Court, on the other hand, was established by Congress to relieve taxpayers of the burdens of pre-payment and to permit them to obtain a determination of their tax liability *before* paying any deficiency. *Id.* at 637, 638.[16] Accordingly, the Tax Court, as a statutory court of limited jurisdiction, possesses "only such power to adjudicate controversies as is conferred upon it by the Internal Revenue Code." *Continental Equities, Inc. v. Commissioner,* 551 F.2d 74, 79 (5th Cir.1977). "It does not have the authority to order that a refund be given, or to review the Commissioner's denial of a refund claim." *Id.*

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[15] Section 6404(h) only grants the Tax Court jurisdiction over a limited class of claims. The claimant must bring an action within 180 days after the mailing of notice of the Secretary's decision not to abate interest, and the claimant must be an individual taxpayer whose net worth does not exceed $2,000,000 at the time the action is filed, or a business, corporation, or partnership of less than 500 employees, whose net worth does not exceed $7,000,000 at the time the action is filed. *See* 26 U.S.C. §§6404(h); §7430(c)(4)(A)(ii).

[16] The Board of Tax Appeals was thus a particular help to those "small" taxpayers who would be less likely to be able to make prepayment of their IRS determined tax liability.

And a specific grant of jurisdiction, such as section 6404(h), is thus necessary for the Tax Court to exercise any jurisdiction.

The same is not true of the district court's refund jurisdiction. Having removed the impediment to district court review identified in *Horton Homes* by indicating that the IRS's decisions on requested interest abatement were not merely matters of administrative grace and that denials were subject to *substantive* challenge, it was not necessary for Congress to provide for a specific grant of jurisdiction to hear abatement denials. To read a grant of jurisdiction to the Tax Court to hear an interest abatement claim, as exclusive would be to read too much into section 6404(h).

Finally, we note that to deny district court jurisdiction to hear claims under section 6404(e)(1) would result in two anomalies. First, only certain taxpayers, namely those who meet the net worth requirements found in section 6404(h), would be able to seek judicial review of the IRS's failure to abate interest. Those taxpayers whose net worth exceeds the limits found in section 6404(h), would be left entirely without recourse. Second, denying district courts the power to hear claims under section 6404(e)(1) would force certain plaintiffs to split their abatement claims from their refund claims, and force them to seek relief in two courts. Thus, a plaintiff who chose to pay his tax liability first and sue in district court under 28 U.S.C. §1346, would not be able to bring, at the same time, a challenge to the IRS's failure to abate interest already collected. Instead, that taxpayer would have to sever his interest abatement claim from his refund claim and pursue the abatement claim separately in the Tax Court. Such splitting of claims is generally considered undesirable, *see, e.g., In re Super Van, Inc.*, 92 F.3d 366, 371 (5th Cir.1996) (discussing rule against claim-splitting), and we cannot conclude, absent some indication to the contrary, that Congress would have intended such a result.

For these reasons, we cannot conclude that the grant of jurisdiction to the Tax Court in section 6404(h) was meant to preclude the exercise of district court jurisdiction over interest abatement claims.

D. *Ministerial or Managerial Act*

Finally, the Government argues that even if the district court erred in dismissing the Bealls' complaint for lack of subject matter jurisdiction, dismissal was nevertheless warranted as the interest at issue did not accrue as a result of any IRS error or delay in performing a ministerial act.

The district court, however, dismissed the Bealls' complaint without addressing this issue. And because we conclude that this issue is best addressed in the first instance in the district court, we decline to address it here.

Conclusion

After examining the legislative history of §6404(e)(1) and (h), we cannot conclude that Congress meant for the Tax Court's jurisdiction to hear section 6404(e)(1) claims to be exclusive. Nor can we conclude that sovereign immunity operates to bar relief in the district courts for a claim for the abatement of interest brought under section 7422.

For these reasons, we find that the district court did have jurisdiction to hear the Bealls' claim for interest abatement. We accordingly REVERSE the judgment of the district court, and REMAND for proceedings consistent with this opinion.

REVERSED and REMANDED

Internal Revenue Code (26 U.S.C.)

§6015(f) Relief From Joint And Several Liability On Joint Return

. . . .

(f) Equitable Relief.–Under procedures prescribed by the Secretary, if–

(1) taking into account all the facts and circumstances, it is inequitable to hold the individual liable for any unpaid tax or any deficiency (or any portion of either), and

(2) relief is not available to such individual under subsection (b) or (c),

the Secretary may relieve such individual of such liability.

§6110. Public Inspection Of Written Determinations

. . . .

(j) Civil Remedies.–

(1) Civil Action.–Whenever the Secretary–

. . . .

(B) fails to follow the procedures insubsection (g) or (i)(4)(B),

the recipient of the written determination or any person identified in the written determination shall have as an exclusive civil remedy an action against the Secretary in the United States Claims Court, which shall have jurisdiction to hear any action under this paragraph.

§6330. Notice And Opportunity For Hearing Before Levy

(d) Proceeding After Hearing.–

. . . .

(1) Judicial Review Of Determination.–The person may, within 30 days of a determination under this section, appeal such determination–

(A) to the Tax Court (and the Tax Court shall have jurisdiction with respect to such matter), or

(B) if the Tax Court does not have jurisdiction of the underlying tax liability, to a district court of the United States.

If a court determines that the appeal was to an incorrect court, a person shall have 30 days after the court determination to file such appeal with the correct court.

§6404. Abatements

. . . .

(e) Abatement of interest attributable to unreasonable errors and delays by Internal Revenue Service.–

(1) In general.–In the case of any assessment of interest on–

(A) any deficiency attributable in whole or in part to any error or delay by an officer or employee of the Internal Revenue Service (acting in his official capacity) in performing a ministerial act, or

(B) any payment of any tax described in §6212(a) to the extent that any unreasonable error or delay in such payment is attributable to such an officer or employee being erroneous or dilatory in performing a ministerial or managerial act,

the Secretary may abate the assessment of all or any part of such interest for any period. For purposes of the preceding sentence, an error or delay shall be taken into account only if no significant aspect of such error or delay can be attributed to the taxpayer involved, and after the Internal Revenue Service has contacted the taxpayer in writing with respect to such deficiency or payment.

. . . .

(h) Review of denial of request for abatement of interest.–

(1) In general.–The Tax Court shall have jurisdiction over any action brought by a taxpayer who meets the requirements referred to in §7430(c)(4)(A)(ii) to determine whether the Secretary's failure to abate interest under this section was an abuse of discretion,

and may order an abatement, if such action is brought within 180 days after the date of the mailing of the Secretary's final determination not to abate such interest.

(2) Special rules.–

(A) Date of mailing.–Rules similar to the rules of section 6213 shall apply for purposes of determining the date of the mailing referred to in paragraph (1).

(B) Relief.–Rules similar to the rules of section 6512(b) shall apply for purposes of this subsection.

(C) Review.– An order of the Tax Court under this subsection shall be reviewable in the same manner as a decision of the Tax Court, but only with respect to the matters determined in such order.

§6511. Limitations On Credit Or Refund

(a) Period of limitation on filing claim.– Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid. Claim for credit or refund of an overpayment of any tax imposed by this title which is required to be paid by means of a stamp shall be filed by the taxpayer within 3 years from the time the tax was paid.

§6512. Limitations In Case Of Petition To Tax Court

(b) Overpayment Determined By Tax Court.–

(1) Jurisdiction To Determine.– Except as provided by paragraph (3) and by section 7463, if the Tax Court finds that there is no deficiency and further finds that the taxpayer has made an overpayment of income tax for the same taxable year, of gift tax for the same calendar year, or calendar quarter, of estate tax in respect of the taxable estate of the same decedent, or of tax imposed by chapter 41, 42, 43, or 44 with respect to any act (or failure to act) to which such petition relates, in respect of which the Secretary determined the deficiency, or finds that there is a deficiency but that the taxpayer has made an overpayment of such tax, the Tax Court shall have jurisdiction to determine the amount of such overpayment, and such amount shall, when the decision of the Tax Court has become final, be credited or refunded to the taxpayer. If a notice of appeal in respect of the decision of the Tax Court is filed under section 7483, the Secretary is authorized to refund or credit the overpayment determined by the Tax Court to the extent the overpayment is not contested on appeal.

(2) Jurisdiction To Enforce.–If, after 120 days after a decision of the Tax Court has become final, the Secretary has failed to refund the overpayment determined by the Tax Court, together with the interest thereon as provided in subchapter B of chapter 67, then the Tax Court, upon motion by the taxpayer, shall have jurisdiction to order the refund of such overpayment and interest. An order of the Tax Court disposing of a motion under this paragraph shall be reviewable in the same manner as a decision of the Tax Court, but only with respect to the matters determined in such order.

(3) Limit On Amount Of Credit Or Refund.–No such credit or refund shall be allowed or made of any portion of

the tax unless the Tax Court determines as part of its decision that such portion was paid—

(A) after the mailing of the notice of deficiency,

(B) within the period which would be applicable under section 6511(b)(2), (c), or (d), if on the date of the mailing of the notice of deficiency a claim had been filed (whether or not filed) stating the grounds upon which the Tax Court finds that there is an overpayment, or

(C) within the period which would be applicable under section 6511(b)(2), (c), or (d), in respect of any claim for refund filed within the applicable period specified in section 6511 and before the date of the mailing of the notice of deficiency--

(i) which had not been disallowed before that date,

(ii) which had been disallowed before that date and in respect of which a timely suit for refund could have been commenced as of that date, or

(iii) in respect of which a suit for refund had been commenced before that date and within the period specified in section 6532.

In the case of a credit or refund relating to an affected item (within the meaning of section 6231(a)(5)), the preceding sentence shall be applied by substituting the periods under sections 6229 and 6230(d) for the periods under section 6511(b)(2), (c), and (d).

In a case described in subparagraph (B) where the date of the mailing of the notice of deficiency is during the third year after the due date (with extensions) for filing the return of tax and no return was filed before such date, the applicable period under subsections (a) and (b)(2) of section 6511 shall be 3 years.

(4) Denial Of Jurisdiction Regarding Certain Credits And Reductions.–The Tax Court shall have no jurisdiction under this subsection to restrain or review any credit or reduction made by the Secretary under section 6402.

§7422. Civil actions for refund

(a) No suit prior to filing claim for refund.–No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

§7430. Awarding of costs and certain fees

. . . .

(c) Definitions.– For purposes of this section–

. . . .

(4) Prevailing party.–

(A) In general .–The term "prevailing party" means any party in any proceeding to which subsection (a) applies (other than the United States or any creditor of the taxpayer involved)–

. . . .

(ii) which meets the requirements of the 1st sentence of §2412(d)(1)(B) of title 28, United States Code (as in effect on October 22, 1986) except to the extent differing procedures are established by rule of court and meets the requirements of §2412(d)(2)(B) of such title 28 (as so in effect).

§7442. Jurisdiction

The Tax Court and its divisions shall have such jurisdiction as is conferred on them by this title, by chapters 1, 2, 3, and 4 of the Internal Revenue Code of 1939, by title II and title III of the Revenue Act of 1926 (44 Stat. 10-87), or by laws enacted subsequent to February 26, 1926.

(Aug. 16, 1954, ch. 736, 68A Stat. 879.)

Judiciary and Judicial Procedure (28 U.S.C.)

§1346. United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws.

§1491. Claims against United States generally; actions involving Tennessee Valley Authority

(a)(1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(2) To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just. The Court of Federal Claims shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under section 10(a)(1) of the Contract Disputes Act of 1978, including a dispute concerning termination of a contract, rights in tangible or intangible property, compliance with cost accounting standards, and other nonmonetary disputes on which a decision of the contracting officer has been issued under section 6 of that Act.

[(3) Repealed. Pub.L. 104-320, § 12(a)(2), Oct. 19, 1996, 110 Stat. 3874]

§2412. Costs and fees

. . . .

(d)(1)(B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the United States was not substantially justified. Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.

. . . .

(2) For the purposes of this subsection–

(B) "party" means (i) an individual whose net worth did not exceed $2,000,000 at the time the civil action was filed, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the civil action was filed, and which had not more than 500 employees at the time the civil action was filed; except that an organization described in §501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. 501(c)(3)) exempt from taxation under §501(a) of such Code, or a cooperative association as defined in §15(a) of the Agricultural

Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association or for purposes of subsection (d)(1)(D), a small entity as defined in §601 of Title 5.

Public Law 104-168, 110 Stat. 1452 (July 30, 1996)

TITLE III – ABATEMENT OF INTEREST AND PENALTIES

SEC. 301. EXPANSION OF AUTHORITY TO ABATE INTEREST.

(a) GENERAL RULE.–Paragraph (1) of section 6404(e) (relating to abatement of interest in certain cases) is amended–

(1) by inserting "unreasonable" before "error" each place it appears in subparagraphs (A) and (B), and

(2) by striking "in performing a ministerial act" each place it appears and inserting "in performing a ministerial or managerial act".

(b) CLERICAL AMENDMENT.–The subsection heading for subsection (e) of section 6404 is amended–

(1) by striking "A SSESSMENTS" and inserting "ABATEMENT",

and

(2) by inserting "UNREASONABLE" before "ERRORS".

(c) EFFECTIVE DATE.–The amendments made by this section shall apply to interest accruing with respect to deficiencies or payments for taxable years beginning after the date of the enactment of this Act.

H.R. CONF. REP. 99-841, H.R. Conf. Rep. No. 841, 99TH Cong., 2ND Sess. 1986, 1986 U.S.C.C.A.N. 4075, 1986 WL 31988 (Leg.Hist.)

P.L. 99-514, **4075 TAX REFORM ACT OF 1986
DATES OF CONSIDERATION AND PASSAGE
House: December 17, 1985; September 25, 1986
Senate: June 24, September 27, 1986
House Report (Ways and Means Committee) No. 99-426, Dec. 7, 1985 [To accompany H.R. 3838]
Senate Report (Finance Committee) No. 99-313, May 29, 1986 [To accompany H.R. 3838]
House Conference Report No. 99-841, Sept. 18, 1986 [To accompany H.R. 3838]
Cong. Record Vol. 131 (1985)
Cong. Record Vol. 132 (1986)
The Conference Report is set out below.
H.R. CONF. REP. 99-841
P.L. 99-514, TAX REFORM ACT OF 1986
HOUSE CONFERENCE REPORT NO. 99-841
September 18, 1986

3. Authority to Abate Interest Due to Errors or Delay by the IRS

Present Law

Under present law, the IRS does not generally have the authority to abate interest charges where the additional interest has been caused by IRS errors and delays. This results from the IRS' long-established position that once tax liability is established, the amount of interest is merely a mathematical computation based on the rate of interest and due date of the return. Consequently, the interest portion of the amount owed to the Government cannot be reduced unles the underlying deficiency is reduced. The IRS does, however, have the authority to abate interest resulting from a **4899 mathematical error of an IRS employee who

assists taxpayers in preparing their income tax returns (sec. 6404(d)).

House Bill

In cases where an IRS official fails either to perform a ministerial act in a timely manner or makes an error in performing a ministerial act, the IRS has the authority to abate the interest attributable to such delay. No aspect of the delay can be attributable to the taxpayer. The House bill gives the IRS the authority to abate interest but does not mandate that it do so (except that the IRS must do so in cases of certain erroneous refunds of $1 million or less, described below). The interest abatement only applies to the period of time attributable to the failure to perform the ministerial act.

The provision applies only to failures to perform ministerial acts that occur after the IRS and the taxpayer have been in contact. This provision does not therefore permit the abatement of interest for the period of time between the date the taxpayer files a return and the date the IRS commences an audit, regardless of the length of that time period. Similarly, if a taxpayer files a return but does not pay the taxes due, this provision would not permit abatement of this interest regardless of how long the IRS took to contact the taxpayer and request payment.

The IRS must abate interest in certain instances in which it issues an erroneous refund check. There are two limitations on this rule. First, it is not to apply in instances in which the taxpayer (or a related party) has in any way caused the overstated refund to occur. Second, it is not to apply to any erroneous refund checks that exceed $1 million. If the taxpayer does not repay the erroneous refund when requested to do so by the IRS, interest would then begin to apply to the amount of the erroneous refund.

This provision is effective for interest accruing with respect to deficiencies or payments for taxable years beginning after 1981.

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132 Cong. Rec. H7351-01-D, 1986 WL 793950 (Cong.Rec.)

Congressional Record --- House of Representatives

Proceedings and Debates of the 99th Congress, Second Session

Thursday, September 18, 1986

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This provision is effective for interest accruing with respect to deficiencies or payments for taxable years beginning after 1981.

Senate Amendment

The Senate amendment is the same as the House bill, except that no significant aspect of the delay can be attributable to the taxpayer, and the provision applies only to failures to perform ministerial acts that occur after the IRS has contacted the taxpayer in writing.

Conference Agreement

The conference agreement follows the Senate amendment, except that the rule requiring the abatement of interest on erroneous refund checks of $1 million or less is only made applicable to erroneous refund checks of $50,000 or less. The provision is effective for taxable years beginning after December 31, 1978.

H.R.Rep. No. 104-506 (1996)

3. ABATEMENT OF INTEREST AND PENALTIES

a. Expansion of authority to abate interest (sec. 301 of the bill and sec. 6404 of the code)

Present law

Any assessment of interest on any deficiency attributable in whole or in part to any error or delay by an officer or employee of the IRS (acting in his official capacity) in performing a ministerial act may be abated.

Reasons for change

The Committee believes that it is appropriate to expand the authority to abate interest to include delays caused by managerial acts of the IRS.

Explanation of provision

The bill permits the IRS to abate interest with respect to any unreasonable error or delay resulting from managerial acts as well as ministerial acts. This would include extensive delays resulting from managerial acts such as: the loss of records by the IRS, IRS personnel transfers, extended illnesses, extended personnel training, or extended leave. On the other hand, interest would not be abated for delays resulting from general administrative decisions. For example, the taxpayer could not claim that the IRS's decision on how to organize the processing of tax returns or its delay in implementing an improved computer system resulted in an unreasonable *28 delay in the Service's action on the taxpayer's tax return, and so the interest on any subsequent deficiency should be waived.

Effective date

The provision applies to interest accruing with respect to deficiencies or payments for taxable years beginning after the date of enactment.

b. Review of IRS failure to abate interest
(sec. 302 of the bill and sec. 6404 of the Code)

Present law

Federal courts generally do not have the jurisdiction to review the IRS's failure to abate interest.

Reasons for change

The Committee believes that it is appropriate for the Tax Court to have jurisdiction to review IRS's failure to abate interest with respect to certain taxpayers.

Explanation of provision

The bill grants the Tax Court jurisdiction to determine whether the IRS's failure to abate interest for an eligible taxpayer was an abuse of discretion. The Tax Court may order an abatement of interest. The action must be brought within 180 days after the date of mailing of the Secretary's final determination not to abate interest. An eligible taxpayer must meet the net worth and size requirements imposed with respect to awards of attorney's fees. No inference is intended as to whether under present law any court has jurisdiction to review IRS's failure to abate interest.

Effective date

The provision applies to requests for abatement after the date of enactment.

H.R.REP. NO. 106-566 (2000)

D. Abatement of Interest (§104 of the Bill and §6404 of the Code)

Present Law

In general

The Secretary of the Treasury can abate or suspend the accrual of interest in a number of situations. In general, the Secretary is authorized to abate interest that is not owed by the taxpayer, either because the interest was erroneously or illegally assessed, or because the interest was assessed after the expiration of the period of limitations. The Secretary also may abate interest that is attributable to certain unreasonable errors and delays by the Internal Revenue Service. The Secretary may abate interest where, in his judgment, the administration and collection costs involved do not warrant the collection of the amount due. The Secretary is required to abate interest in the case of a declared disaster or certain erroneous refunds attributable solely to errors made by the IRS. The Secretary is required to suspend the accrual of interest if the IRS fails to contact the taxpayer in a timely manner and in the case of taxpayers serving in a combat zone.

Interest that is abated is not owed by the taxpayer and does not accrue additional interest through compounding or result in any additional penalties. If the accrual of interest is suspended for a period, then that period is not taken into account in determining the interest owed on an underpayment.

Abatement of interest that is erroneously or illegally assessed

Most abatements of interest are a result of adjustments to the underlying tax liability. Underpayment interest is assessed any time an underpayment is assessed. If the

underlying tax liability is later adjusted, resulting in a reduction in the amount of the underpayment, the portion of the interest attributable to such adjustment must be abated.

Abatements due to unreasonable error or delay by the IRS

If any part of an underpayment of a tax described in section 6212(a) [FN19] is attributable to an unreasonable error or delay by an officer or employee of the Internal Revenue Service, acting in his official capacity, in the performance of a ministerial or managerial act, the Secretary may abate all or a part of the interest on the underpayment. Similarly, if a delay in the payment of tax is attributable to such an officer or employee being erroneous or dilatory *29 in performing a ministerial or managerial act, the Secretary may abate all the interest that would otherwise accrue for that period.

Prior to 1986, the IRS generally did not have the authority to abate interest charges that were properly calculated and based on a correctly determined underpayment. This was the case even if the IRS errors or delays had prevented the earlier satisfaction of the taxpayer's underpayment and resulted in the accrual of additional interest. The Tax Reform Act of 1986 provided the IRS the authority to abate interest where an IRS official fails either to perform a ministerial act in a timely manner or makes an error in performing a ministerial act. The term 'ministerial act' means "a nondiscretionary act when all of the prerequisites to the (a)ct, such as fact gathering, analysis, decision-making, and conferencing and review by supervisors, have taken place." [FN20] Abatement is available under this authority only where "no significant aspect of the error or delay can be attributable to the taxpayer" [FN21] and relates only to periods after the taxpayer has been contacted for examination. [FN22] The

rule authorizes, but does not require the abatement of interest. Abatement is at the discretion of the Secretary. "Congress did not intend that this provision be used routinely to avoid the payment of interest; rather, it intended that the provision be utilized in instances where failure to perform a ministerial act results in the imposition of interest, and the failure to abate the interest would be widely perceived as grossly unfair." [FN23]

In 1996, the authority to abate interest was expanded to permit the IRS to abate interest with respect to any unreasonable error or delay resulting from the managerial as well as ministerial acts. A managerial act is an administrative act that occurs during the processing of a taxpayer's case involving the temporary or permanent loss of records or the exercise of judgement or discretion relating to the management of personnel. [FN24] This allows interest to be abated where extensive delays result from managerial acts such as the loss of records by the IRS, IRS personnel transfers, extended illnesses, extended personnel training, or extended leave. "For this purpose, delays resulting from managerial acts do not include delays resulting from general administrative decisions. For example, the taxpayer could not claim that the IRS's decision on how to organize the processing of tax returns or its delay in implementing an improved computer system resulted in an unreasonable delay in the Service's action on the taxpayer's tax return, and so the interest on any subsequent deficiency should be waived." [FN25]

The authority to abate interest under this rule does not apply where an underpayment or delay in payment of tax is attributable to an error or delay by an officer or employee of the IRS in the performance of an act that is not managerial or ministerial. Ministerial *30 and managerial acts do not include a decision as to the application of any Federal or state law, including any Federal tax law. [FN26]

The proposed regulations provide a number of examples of situations in which abatement of interest under this rule would or would not be allowed. Abatement is generally limited to situations where resolution of the taxpayer's liability is delayed because the IRS has failed to assign appropriate personnel to a taxpayer's case (a managerial act), there is an unaccountable delay in the issuance of a notice by the IRS (a ministerial act), an IRS employee requests an insufficient amount of payment because he misreads the amount on the taxpayer's master file (a ministerial act), or the IRS loses or misplaces vital information (a managerial act). Abatement is not available where the delay in resolving the taxpayer's liability is attributable to excessive time spent by the IRS in interpreting the tax laws, to erroneous interpretations and calculations made by the IRS, to the IRS' decision to examine other returns prior to the examination of the taxpayer's return, or to other failures to resolve a taxpayer's liability in a timely manner.

Abatement of interest on erroneous refunds

The Secretary is required to abate interest on an erroneous refund for the period from the issuance of the refund until its return is demanded. [FN27] Since the taxpayer has 21 days from the date of demand to pay without interest, [FN28] no interest must be paid as the result of an erroneous refund if the taxpayer repays the refund within 21 days of the IRS asking for its return. If the taxpayer does not repay the refund within the 21 day grace period, interest must be paid from the date the return of the refund is demanded. The rule abating interest in the case of erroneous refunds does not apply if the taxpayer (or a related party) has in any way caused the erroneous refund or if the amount of the erroneous refund exceeds $50,000.

Abatement of penalties and additions to tax attributable to erroneous written advice given by the IRS

The Secretary is required to abate any portion of any penalty or addition to tax attributable to erroneous advice furnished to the taxpayer in writing by an officer or employee of the IRS acting in his or her official capacity. The abatement applies only if (1) the advice is given in response to a specific written request made by the taxpayer, (2) the taxpayer reasonably relied on the advice, and (3) the taxpayer provided adequate and accurate information. [FN29]

Only penalties and additions to tax that are attributable to erroneous written advice given by the IRS are abated under this rule. Interest is abated only to the extent that it is attributable to abated penalties and additions to tax. Interest attributable to an underpayment of tax, where such underpayment is the result of the taxpayer's proper reliance on written advice of the IRS, is not eligible for abatement.*31

Suspension of the accrual of interest for taxpayers serving in a combat zone [FN30]

Taxpayers serving in a combat zone generally are not required to file tax returns or pay taxes until 180 days after their service in the combat zone is completed. Accordingly, the accrual of interest on any underpayment is suspended during that period. [FN31] This suspension of interest applies to the underpayment of any tax, whether or not related to a return that would otherwise have been due while the taxpayer was serving in the combat zone.

A taxpayer is serving in a combat zone if serving in the Armed Forces of the United States in an area designated as a "combat zone" during the period of combatant activities. An individual who becomes a prisoner of war is considered to continue in such active service. An individual serving in

support of the Armed Forces of the United States in the combat zone, such as Red Cross personnel, accredited correspondents, and civilian personnel acting under the direction of the Armed Forces, are also considered to be serving in the combat zone for this purpose. The designation of a combat zone may be made by the President in an Executive Order, or may be declared legislatively by the Congress. The President must also designate the period of combatant activities in the combat zone (the starting date and the termination date of combat).

The suspension of interest applies during the period of combatant activities in the combat zone, as well as (1) any time of continuous qualified hospitalization resulting from injury received in the combat zone or (2) time in missing in action status, plus the next 180 days.

Taxpayers located in a Presidentially declared disaster area

In the case of a Presidentially declared disaster, the Secretary of the Treasury has the authority to extend the filing date for returns of taxpayers that are located in the disaster area. The Secretary may also extend the payment date for any taxes shown on such an extended return. If the Secretary extends the filing and payment dates, any interest that would otherwise be accrued during the period of the extension must be abated. [FN32]

Suspension of interest where the Secretary fails to contact a taxpayer

For individual taxpayers who have filed a timely Federal income tax return, the accrual of interest is suspended after 1 year if the IRS has not sent the taxpayer a notice specifically stating the taxpayer's liability and the basis for the liability within the specified period. With respect to taxable years beginning before January 1, 2004, the 1-year period is increased to 18 months. Interest and

penalties resume 21 days after the IRS sends the required notice to the taxpayer. The rule applies separately with respect to each *32 item or adjustment [FN33] and does not apply where a taxpayer has self-assessed the tax. The suspension does not apply in the case of fraud. [FN34] Any interest that is assessed with respect to the suspension period is required to be abated.

Procedures for the abatement of interest

Taxpayers may apply for the abatement of interest by filing a claim on Form 843 with the Internal Revenue Service Center that has assessed the interest the taxpayer seeks to have abated. [FN35]

Typically, interest is abated when the amount of tax assessed is reduced. Thus, any procedure that may result in the reduction of assessed tax may also result in an abatement of interest.

Where abatement of interest is sought separate from any redetermination of tax the availability of judicial review depends upon the basis on which abatement is sought. If the IRS is required to abate the interest, judicial review is available to determine if the facts exist that mandate abatement. The Taxpayer Bill of Rights 2 specifically granted jurisdiction to the Tax Court to review for abuse of discretion any decision by the IRS not to abate interest that is attributable to unreasonable error or delay by Service employees in the performance of a ministerial or managerial act, effective for requests for abatement filed after July 30, 1996. [FN36] Otherwise, review of the Secretary's failure to use his or her discretion to abate interest may not be available. The courts have held that judicial review of the IRS' failure to use its discretion to abate interest is generally not available, unless jurisdiction is specifically granted by statute or a standard for review has been established. [FN37]

Reasons for Change

The Committee believes that there are additional situations in which it is not appropriate for the Secretary to collect interest on an underpayment of tax.

Explanation of Provision

Allow the abatement of interest if a gross injustice would otherwise result if interest were to be charged

The bill grants the Secretary the authority to abate interest if a gross injustice would otherwise result if interest were to be charged and no significant aspect of the events giving rise to the accrual of the interest can be attributed to the taxpayer. This authority is intended to allow the Secretary to address those extraordinary situations where normally appropriate rules could result in a gross injustice if strictly applied. It is anticipated that such authority will be used infrequently and will be determined on a case- by-case basis. *33

Abatement under this authority is solely within the discretion of the Secretary.

Allow the abatement of interest for periods attributable to any unreasonable IRS error or delay

The bill grants the Secretary the authority to abate interest for any period that is attributable to unreasonable IRS errors or delays, whether or not related to managerial or ministerial acts. Abatement is not expected to be available to the extent the taxpayer contributes to the delay by providing erroneous information or failing to provide reasonably requested information within a reasonable period, or otherwise failing to timely disclose information or cooperate with reasonable IRS requests.

The bill allows the Secretary to consider abatement of interest in situations where unreasonable errors or delays occur in the context of the consideration of a legal position.

For example, an IRS field agent refers a complicated issue to the IRS National Office. The National Office attorney misplaces the file and is then transferred to a different branch without either notifying his superiors that the file is missing or arranging for the transfer of the issue to his replacement. Some time later, the file is found and the issue reassigned. Assuming that this results in an unreasonable delay in the resolution of the taxpayer's liability, interest for the period from the original misplacing of the file until the issue is reassigned may be abated.

The bill also allows the Secretary to consider abatement in situations where an IRS employee gives erroneous advice or information that the employee knows, or should know, will cause the taxpayer to believe that his liability is resolved. For example, an IRS employee tells a taxpayer by telephone that a payment will be satisfactory to settle his liability for a taxable year. In fact, the IRS employee has made a error in calculating the amount owed by the taxpayer and the amount he requests is insufficient. [FN38] The taxpayer makes the requested payment and is surprised some time later to discover that the IRS is seeking an additional payment for the year. The bill allows the Secretary to abate the interest attributable to the period that occurs after the taxpayer had made the payment he was led to believe would satisfy his liability, provided the taxpayer did not contribute to the error in any significant way, such as by providing erroneous information that was used by the IRS employee to determine the insufficient payment amount.

It is not expected that this expansion of authority will result in an abatement of interest solely because the taxpayer is not able to resolve its tax liability as quickly as the taxpayer would like. Interest owed by a taxpayer will not be abated because other taxpayers have their returns examined first, or because the determination of the taxpayer's liability proves difficult and requires additional

time. Abatement is expected to be available only where the additional time needed to resolve the taxpayer's liability is the result of unreasonable error or delay by the IRS, considering all the facts and circumstances applicable to the taxpayer's case. *34

Allow for the abatement of interest in situations where the taxpayer is repaying an excessive refund based on IRS calculations without regard to the size of the refund

The bill eliminates the $50,000 threshold for abatement of interest on erroneous refunds. Under the bill, the Secretary is required to abate interest on any erroneous refund, provided the taxpayer has not in any way caused the erroneous refund to occur.

Allow the abatement of interest to the extent the interest is attributable to taxpayer reliance on written statements of the IRS

The bill requires the Secretary to abate interest on an underpayment where the underpayment is attributable to erroneous advice furnished to the taxpayer in writing by an officer or employee of the IRS acting in his or her official capacity. It is anticipated that the abatement would apply to interest attributable to the period of time from the issuance of the erroneous advice through the day that is 21 days (10 days in the case of an underpayment in excess of $100,000) after the day the IRS gives written notice that its advice was erroneous. The bill does not eliminate the taxpayer's obligation to satisfy any underpayment of tax attributable to such erroneous advice.

Effective Date

The changes made by these provisions are effective with respect to interest accruing on or after the date of enactment.

Footnotes:

FN19 The taxes described in section 6212(a) are those with respect to which a deficiency may be assessed. These include the income, estate, gift, generation skipping, and certain excise taxes.

FN20 Joint Committee on Taxation, General Explanation of the Tax Reform Act of 1986 ("Bluebook") (JCS-10-87), at 1310.

FN21 H.Rept. No. 99-841 (Conference Report on the Tax Reform Act of 1986), at II-811.

FN22 *Id.*

FN23 Joint Committee on Taxation, General Explanation of the Tax Reform Act of 1986 ("Bluebook") (JCS-10-87), at 1310.

FN24 Treas. Regs. §301.6404-2(b).

FN25 H.Rept. 104-506 (Taxpayer Bill of Rights 2).

FN26 Treas. Reg. §301.6404-2(b).

FN27 27 §6404(e)(2).

FN28 §6601(e)(3).

FN29 §6404(f).

FN30 The relief available to taxpayers serving in combat zones is discussed more fully in Joint Committee on Taxation, Description of Present Law and a Proposal Relating to Tax Relief for Personnel in the Federal Republic of Yugoslavia (Serbia/Montenegro), Albania, the Adriatic Sea, and the Northern Ionian Sea (JCX-18-99).

FN31 §7508.

FN32 §6404(h).

FN33 For example, if the IRS sends a math error notice to a taxpayer 2 months after the return is filed and also sends a notice of deficiency related to a different item 2 years later, the suspension of interest applies to the item reflected on the second notice (notwithstanding that the first notice was sent within the applicable time period).

FN34 §6404(g).

FN35 Rev. Proc. 87-43, 1987-2 C.B. 590.

FN36 §6404 (as amended by §301 of the Taxpayer Bill of Rights 2).

FN37 *Horton Homes, Inc. v. United States*, 727 F. Supp. 1450 (M.D. Ga. 1990) *aff'd.*, 936 F.2d 548 (11th Cir. 1991).

FN38 Abatement could be allowed under present law if the error were in the performance of a ministerial act, such as reading the taxpayer's transcript.